(22,640)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 273.

OSCAR WILKINSON AND THOMAS J. KEMP, PLAINTIFFS IN ERROR,

vs.

OSCAR A. M. McKIMMIE AND SIMON McKIMMIE.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 24, 1913.

In the Court of Appeals of the District of Columbia.

No. 2197.

OSCAR WILKINSON et al., Appellants,
vs.
OSCAR A. MCKIMMIE.

a Supreme Court of the District of Columbia.

At Law. No. 51527.

OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE, Plaintiffs,
vs.
OSCAR WILKINSON and THOMAS J. KEMP, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed April 2, 1909.

In the Supreme Court of the District of Columbia.

At Law. 51527.

OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE, Plaintiffs,
vs.
GEORGE P. HORTON, JR., OSCAR WILKINSON, and THOMAS J. KEMP, Defendants.

The plaintiffs sue the defendants for money payable by the defendants to the plaintiffs for that whereas the said defendant, George P. Horton, jr., as principal, and the said defendants Oscar Wilkinson and Thomas J. Kemp, as sureties, by their certain writing obligatory under their hands and seals by the name of George P. Horton, jr., Oscar Wilkinson and Thomas J. Kemp, the date whereof

is the 10th day of January, A. D. 1906, and which writing is now shown to the Court here, acknowledged themselves to be held and firmly bound unto the plaintiffs in the full sum of Seven Thousand Dollars ($7,000.00) lawful money of the United States to be paid to the said plaintiffs, which said writing obligatory was subject to the condition that whereas the said George P. Horton, jr., had entered into a contract bearing date November 27, A. D. 1905, with the plaintiffs for the purchase of lands by the said George P. Horton, jr.,
2 of the said plaintiffs, and for the performance of certain other matters and things embraced in said contract, which said contract is to be read as a part of said writing obligatory, the condition of said obligation was such that if the said principal should duly and faithfully perform and fulfil all and every of the conditions and covenants of said contract on his part to be kept and performed and should keep harmless and protect the said plaintiffs from and against all loss or damage by reason of the non-fulfillment by the said Horton of the covenants of said contract to be performed by him as aforesaid then the said obligation was to be void, otherwise to be and remain in full force and effect.

And for that the said agreement referred to in said writing obligatory provided among other things that the said plaintiffs would sell and convey to the said Horton certain real estate in said agreement described for the price of $11,500.00 to be paid in the manner therein set forth and the said Horton in consideration of the agreement on the part of the said plaintiffs agreed to pay the said purchase money in the manner set forth in said agreement and to re-convey to the said plaintiffs two lots each 16 feet 8 inches front on Brightwood Avenue to be sold and conveyed free and clear of all incumbrances, liens, claims or indebtedness and to erect on each lot a two-story brick dwelling containing six rooms and bath with cellar and steam heating apparatus, to be constructed and built from plans and specifications approved by said plaintiffs within eight months of the date of said agreement.

And the plaintiffs say that they conveyed to said Horton
3 the said real estate described in said agreement except that in lieu of conveying to him the two lots each 16 feet 8 inches front on Brightwood avenue the said plaintiffs at the request of said Horton for the purpose of saving the expense and inconvenience of reconveyance retained the title to the two such lots mutually agreed upon and selected by them and the said Horton.

And the plaintiffs further say that at the request of the said Horton and with the consent of said sureties the time for performance of said agreement was extended for a period up to January 2, 1907, and thereafter at the request of said Horton and with the consent of said sureties the time for fulfillment of said contract was further extended for a period up to May 2, 1907.

And the plaintiffs further say that although they have as aforesaid fully performed within the time required by said agreement all the obligations imposed upon them thereby yet the said Horton not regarding the said covenants and agreements hath broken the same and although often requested has wholly failed to keep and

perform said agreement in this that he has not erected on each of said lots of 16 feet 8 inches front on Brightwood avenue selected as aforesaid nor on either one of said lots such a dwelling as is required and provided for in the said agreement.

And the plaintiffs say that the said two lots by reason of the failure of said Horton to comply with his said agreement are worth, to wit, $7,000.00 less to the plaintiffs than they would have been had said houses been erected thereon as required by said agreement.

And the plaintiffs claim the sum of $7,000.00 with in-
4 terest from May 2, 1907, besides costs.

WM. E. AMBROSE,
Attorney for Plaintiffs.

Notice to Plead.

The defendants are to plead hereto on or before the 20th day exclusive of Sundays and holidays occurring after the date of service hereof, otherwise judgment.

WM. E. AMBROSE,
Att'y for Plaintiffs.

Demurrer.

Filed April 7, 1909.

* * * * * * *

The defendants, Oscar Wilkinson and Thomas J. Kemp, by Charles Poe, their attorney, as to the declaration herein say that the same is bad in substance.

CHAS. POE,
Attorney for Defendants Wilkinson and Kemp.

Memorandum.

One of the questions of law intended to be presented by the above demurrer is whether there has not been such a variation of
5 the terms of the contract and bond sued upon as to the release and discharge the defendants Oscar Wilkinson and Thomas J. Kemp from any liability thereupon.

CHAS. POE,
Attorney for Defendants Wilkinson and Kemp.

(Endorsed.)

Service of copy accepted.

WM. E. AMBROSE.

Block.
Apr. 7, 1909.

Supreme Court of the District of Columbia.

FRIDAY, *April 16th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Upon consideration of the demurrer filed herein to the declaration, it is ordered that said demurrer be, and the same is hereby sustained with leave to plaintiffs to file an amended declaration herein as advised, within twenty days hereof.

6 *Amended Declaration.*

Filed May 5, 1909.

* * * * * * *

The plaintiffs by leave of the Court first obtained file this amended declaration as follows:

The plaintiffs sue the defendants for money payable by the defendants to the plaintiffs for that whereas the said defendant, George P. Horton, jr., as principal, and the said defendants Oscar Wilkinson and Thomas J. Kemp, as sureties, by their certain writing obligatory under their hands and seals by the name of Geo. P. Horton, jr., Oscar Wilkinson and T. J. Kemp, the date whereof is the 10th day of January, A. D. 1906, and which writing is now shown to the Court here, acknowledged themselves to be held and firmly bound unto the plaintiffs in the full sum of Seven Thousand Dollars ($7,000.00) lawful money of the United States to be paid to the said plaintiffs, which said writing obligatory was subject to the condition that whereas the said George P. Horton, jr., had entered into a contract bearing date November 27, A. D. 1905, with the plaintiffs for the purchase of lands by the said George P. Horton, jr., of the said plaintiffs, and for the performance of certain other matters and things embraced in said contract, which said contract is to be read as a part of said writing obligatory, the condition of said obligation was such that if the said principal should duly and faithfully perform and fulfill all and every of the conditions
7 and covenants of said contract on his part to be kept and performed and should keep harmless and protect the said plaintiffs from and against all loss or damage by reason of the nonfulfillment by the said Horton of the covenants of said contract to be performed by him as aforesaid then the said obligation was to be void, otherwise to be and remain in full force and effect.

And for that the said agreement referred to in said writing obligatory provided among other things that the said plaintiffs would sell and convey to the said Horton certain real estate in said agreement described for the price of $11,500.00 to be paid in the manner therein set forth and the said Horton in consideration of the agreement on the part of the said plaintiffs agreed to pay the said purchase money in the manner set forth in said agreement and to re-convey to the said plaintiffs two lots each 16 feet 8 inches front on Brightwood Avenue to be sold and conveyed free and clear of all incumbrances, liens, claims or indebtedness and to erect on each lot a two-story brick dwelling containing six rooms and bath with cellar and steam heating apparatus, to be constructed and built from plans and specifications approved by said plaintiffs within eight months of the date of said agreement.

And the plaintiffs say that they conveyed to said Horton the said real estate described in said agreement except that in lieu of conveying to him the two lots each 16 feet 8 inches front on Brightwood avenue the said plaintiffs at the request of said Horton for the purpose of saving the expense and inconvenience of reconveyance retained the title to the two such lots mutually agreed upon
8 and selected by them and the said Horton.

And the plaintiffs further say that at the request of the said Horton and with the written consent of said sureties the time for performance of said agreement was extended for a period up to January 2, 1907, and thereafter at the request of said Horton and with the written consent of said sureties the time for fulfillment of said contract was further extended for a period up to the 2nd day of May, 1907, and the plaintiffs further say that prior to the making of said extensions the said sureties had actual notice of the fact that the said two lots each fronting 16 feet 8 inches on Brightwood Avenue had not been conveyed by plaintiff to said Horton and with such actual knowledge not only assented to the extensions aforesaid but expressly affirmed their liability under the said writing obligatory dated January 19, 1906.

And the plaintiffs further say that although they have as aforesaid fully performed within the time required by said agreement as extended as aforesaid all of the obligations imposed upon them thereby yet the said Horton not regarding the said covenants and agreements hath broken the same and although often requested has wholly failed to keep and perform said agreement in this that he has not erected on each of said lots of 16 feet 8 inches front on Brightwood Avenue selected as aforesaid nor on either one of said lots such a dwelling as is required and provided for in the said agreement.

And the plaintiffs say that the said two lots by reason of the failure of said Horton to comply with his said agreement are worth,
9 to wit, $7,000 less to the plaintiffs than they would have been had said houses been erected thereon as required by said agreement.

And the plaintiffs claim the sum of $7,000.00 with interest from May 2, 1907, besides costs.

W. E. AMBROSE,
Attorney for Plaintiffs.

Notice to Plead.

The defendants are to plead hereto on or before the 20th day exclusive of Sundays and legal holidays occurring after the date of service hereto, otherwise judgment.

WM. E. AMBROSE,
Att'y for Plaintiffs.

Pleas to Amended Declaration.

Filed June 3, 1909.

* * * * * * *

The defendants, Oscar Wilkinson and Thomas J. Kemp, by Charles Poe, their attorney, for a first plea to the said amended declaration, say that they never were indebted as therein alleged.

And for a second plea to said declaration the said defendants, by their said attorney, say that the defendant, George P. Horton, Jr., did well and truly carry out and perform all the terms and
10 conditions of the agreement and writing obligatory in said declaration mentioned.

And for a third plea the said defendants by their said attorney, say that the said plaintiffs were not injured or damnified by the alleged failure of said George P. Horton, Jr. to carry out and fully perform the terms and conditions of the said agreement and said writing obligatory in said declaration mentioned.

And for a fourth plea the said defendants, by their said attorney, say that they never had notice of the fact that the said two lots each fronting 16 feet 8 inches on Brightwood Avenue had not been conveyed by the plaintiffs to said Horton and never assented to any extensions as set forth in said declaration or expressly or otherwise affirmed their liability under the said writing obligatory dated January 10, 1906.

And for a fifth plea said defendants, by their said attorney, say that they never assented to the alteration or modification of any of the terms or conditions of the agreement or writing obligatory in said declaration mentioned.

CHAS. POE,
Attorney for Defendants Wilkinson and Kemp.

11 *Joinder of Issue.*

Filed June 29, 1909.

* * * * * * *

The plaintiffs join issue on the pleas of Thomas J. Kemp and Oscar Wilkinson to the amended declaration.

WM. E. AMBROSE,
Attorney for Plaintiffs.

Order for Discontinuance as to Horton.

Filed March 14, 1910.

* * * * * * *

The Clerk of said Court will enter this cause discontinued as against George P. Horton Jr.

WILLIAM E. AMBROSE,
JOHN RIDOUT,
Attorneys for Pl'ffs.

Memorandum.

April 13, 1910.—Verdict for Plaintiffs for $5,736.72.

12 *Interrogatories Answered by the Jury.*

Filed April 13, 1910.

* * * * * * *

Question 1. Did the Defendants sign the extension paper dated July 27th 1906?

Answer. Yes.

Question 2. If they did sign it, did they at that time know that the two lots had not been conveyed to Horton?

Answer. Yes.

Question 3. Did the Defendants sign the extension paper dated November 27th 1906?

Answer. Yes.

Question 4. If they did sign it, did they at that time know that the two lots had not been conveyed to Horton?

Answer. Yes.

WILLIAM T. WHELAN,
Foreman.

Motion for New Trial.

Filed April 15, 1910.

* * * * * * *

Now come the defendants, by their attorney, and move the Court to grant a new trial of the issues herein, and assign the following grounds for this motion:

13 1. Because the verdict of the Jury is against the evidence;

2. Because the Court erred in submitting the issues joined upon the pleadings herein to the Jury;

3. Because of other errors of law committed by the trial Judge at the trial of said issues.

CHARLES POE,
W. L. FURBERSHAW,
Attorneys for Defendants.

To Wm. E. Ambrose and John Ridout, Esqs., Attorneys for Plaintiffs:

You are hereby notified that the above motion will be called for hearing before his Honor, Justice Wright, on Friday, April 22nd, at 10:00 o'clock, A. M., or as soon thereafter as counsel can be heard.

CHAS. POE,
W. L. FURBERSHAW,
Attorneys for Defendants.

Motion in Arrest of Judgment.

Filed April 15, 1910.

* * * * * * *

Now come the defendants, by their said attorney, and move
14 the Court in arrest of judgment upon the verdict of the Jury heretofore entered herein and assign the following grounds for their said motion:

1st. Because, though the bond sued on as the cause of action is under the statutes in such case made and provided a joint and several bond, the action herein is prosecuted against only two of the three joint and several obligors therein named;

2nd. Because the record shows that the plaintiffs have discontinued this action against one of three joint and several obligors and continued it against the remaining two only;

3rd. Because, although one of three joint and several obligors has died since the institution of this suit, the plaintiffs herein have failed to make the personal representative of said deceased joint and several obligor a party defendant to this suit;

4th. Because the declaration herein, upon its face, shows that the bond sued upon was altered and amended by parol agreement of the parties thereto subsequent to its execution under seal and no recovery can be had, nor judgment entered thereupon, upon the pleadings in this cause; and,

5th. For other defects and irregularities apparent upon the face of the record.

CHAS. POE,
W. L. FURBERSHAW.
Attorneys for Defendants.

15 To Wm. E. Ambrose and John Ridout, Esqs., Attorneys for Plaintiffs.

GENTLEMEN: You are hereby notified that the above motion will be called for hearing before his Honor, Justice Wright, on Friday, April 22nd, 1900, at 10:00 o'clock, A. M., or as soon thereafter as counsel can be heard.

CHARLES POE,
W. L. FURBERSHAW,
Attorneys for Defendants.

Supreme Court of the District of Columbia.

SATURDAY, *May* 7, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

This cause coming on to be heard upon the motions of defendants Oscar Wilkinson and Thomas J. Kemp for a new trial and

in arrest of judgment, filed herein, the same having heretofore been argued and submitted to the Court, it is considered that said motions be and they hereby are overruled, and judgment on verdict ordered.

Therefore it is considered that the plaintiffs recover against the defendants Oscar Wilkinson and Thomas J. Kemp, the sum of Five thousand, seven hundred, and thirty-six and 72/100 dollars
16 ($5,736.72) with interest thereon from this date, being the money payable by said defendants Oscar Wilkinson and Thomas J. Kemp to the plaintiffs by reason of the premises, together with the costs of suit, to be taxed by the Clerk, and have execution thereof.

Memoranda.

May 9, 1910—Appeal noted in open Court.
May 16, 1910—Appeal bond approved and filed.
June 3, 1910—Time in which to file Transcript of Record in Court of Appeals extended to, and including, August 1, 1910.

Directions to Clerk for Preparation of Transcript of Record.

Filed June 4, 1910.

* * * * * * *

Mr. YOUNG:

In making up the Transcript of Record on appeal herein you will include the following, to wit:

17

1909.
April 2nd. Declaration.
" 7th. Demurrer.
" 16th. Judgment sustaining demurrer.
May 5th. Amended Declaration.
June 3rd. Pleas to amended declaration.
" 29th. Joinder of issue.
1910.
Mar. 14th. Order discontinuing cause as to Horton.
Apl. 13th. Verdict.
Apl. 13th. Interrogatories to Jury and answers.
" 15th. Motion for new trial.
" 15th. Motion in arrest of judgment.
May 7th. Judgment.
May 9th. Appeal prayed and allowed. (mem.)
May 16th. Approved Bond for costs. (mem.)
Bill of exceptions.
June 3rd. Order extending time to file transcript.
June 4th. This order.

CHAS. POE,
Att'y for Wilkinson & Kemp.

18 Supreme Court of the District of Columbia.

MONDAY, *June* 6, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wrigh presiding.

* * * * * * *

Now come here the defendants Oscar Wilkinson and Thomas J Kemp by their Attorney and pray the Court to sign, seal and mak part of the record, their bill of exceptions taken during the tria of this cause (heretofore submitted) now for then, which is accord ingly done.

Bill of Exceptions.

Filed June 6, 1910.

* * * * * * *

Be it remembered, that, at the trial of this cause, in the Suprem Court of the District of Columbia, before the Honorable Danie Thew Wright, and a jury, the plaintiffs, to maintain the issues o their part joined between themselves and the defendants Wilkinso and Kemp offered in evidence the following bond and the agreemen therein referred to and made part thereof; which are in the follow ing words and figures:

Know all men by these presents, that we, George P. Horton Junior, principal, Oscar Wilkinson and Thomas J. Kemp, sureties are held and firmly bound unto Oscar A. M. McKimmi

19 and Simon McKimmie in the full sum of Seven Thousan Dollars ($7000.00) lawful money of the United States o America, to be paid to the said obligees, their certain attorney, execu tors, administrators, successors or assigns; to which payment wel and truly to be made, we do hereby jointly and severally, bind an obligate ourselves, our heirs, executors, administrators and successor and each and every one of them firmly by these presents.

Sealed with our seals and dated the 10th day of January, A. D. 1906.

Whereas, George P. Horton, Junior, the principal herein, entere into a contract bearing date November 27th A. D., 1905, with Osca A. M. McKimmie and Simon McKimmie, the obligees herein, fo the purchase of lands by the said George P. Horton, Junior, of th said obligees, and for the performances of certain other matters an things embraced in said contract, which said contract is annexe hereto and is to be read as a part hereof, and,

Whereas, the said Oscar Wilkinson and Thomas J. Kemp, ar desirous of securing to the obligees a strict compliance with th covenants of said contract, to be kept and performed upon the par of said George P. Horton, Junior, for good and sufficient consid erations passing from the obligees to them.

Now the conditions of this obligation is such that if the sai

principal shall duly and faithfully perform and fulfill all and
20 every the conditions and covenants of his contract hereinbefore mentioned on his part to be kept and performed and shall keep harmless and protect the said obligees from and against all loss or damage by reason of the non-fulfillment by the said principal of the covenants of said contract to be performed by him as aforesaid and also against actual losses by reason of any and all claims, defects, errors, obligations, liens and encumbrances arising from the non-fulfillment by the said principal of said covenants, then this obligation to be void otherwise to be and remain in full force and effect.

And upon a further condition that if any liability shall accrue on the part of the sureties herein by reason of this obligation under settlement of the same by the said sureties in accordance with the tenor hereof the said sureties shall be subrogated to all of the rights and remedies which the obligees would have had against the principal, in this obligation, or any other person the obligees are bound by acceptance of this obligation to authorize and permit the sureties herein to use the names of the said obligees for the recovery thereof, upon condition, nevertheless, that said obligees shall be saved harmless from all costs, charges, expenses and losses incident thereto.

In testimony thereof we have hereunto set our hands and seals this 10th day of January, A. D. 1906.

GEO. P. HORTON. [SEAL.]
OSCAR WILKINSON. [SEAL.]
T. J. KEMP. [SEAL.]

21 Signed, sealed and delivered in the presence of
S. A. TERRY.

DISTRICT OF COLUMBIA, *ss:*

I, S. A. Terry, a Notary Public in and for the District of Columbia do hereby certify that George P. Horton, Junior, Oscar Wilkinson and Thomas J. Kemp parties to a certain bond bearing date on the 10th day of January, A. D. 1906, and hereto annexed, personally appeared before me in said District the said George P. Horton, Junior, Oscar Wilkinson and Thomas J. Kemp, being personally well known to me as the persons who executed the said bond and acknowledged the same to be their act and deed.

Given under my hand and seal this 10th day of January, 1906.

S. A. TERRY,
[SEAL NOTARIAL.] *Notary Public, D. C.*

Agreement.

This agreement made this Twenty-seventh day of November, A. D., 1906, by and between Oscar A. M. McKimmie and Simon McKimmie, parties of the first part and George P. Horton, Jr., party of the second part, all of the District of Columbia.

Witnesseth, That in consideration of the covenants herein-
22 after to be performed by the party of the second part, and further, the sum of Ten Dollars ($10.00), in hand paid by

the party of the second to the parties of the first part, receipt whereof is hereby acknowledged by the parties of the first part, the parties of the first part hereby covenant and agree to sell and convey to said parties of the second part all those pieces and parcels of land known as lots 27, 28, 29 and 30 in Block 9 of Todd and Brown's Subdivision of Mount Pleasant and Pleasant Plains, in said District of Columbia, at and for the price and sum of Eleven Thousand Five Hundred Dollars ($11,500.00) and upon the terms and conditions hereinafter stated.

In consideration of the said conveyance to be made and further the sum of Ten Dollars ($10.00) paid as aforesaid the said party of the second part covenants and agrees to purchase said land at and for the price and sum stated $11,500 upon the following terms and conditions, to-wit:—Assume and pay present indebtedness aggregating Three Thousand Dollars ($3,000), now secured by certain Deeds of Trust on said land, to pay One Thousand Dollars ($1,000) in cash delivery of Deed to said land; to re-convey to said parties of the first part two (2) lots each sixteen (16) feet eight (8) inches front on Brightwood Avenue (part of the land above described) free and clear of all incumbrances, liens, claims or indebtedness and to erect on each lot a two (2) story brick dwelling containing six rooms and bath, with cellar and steam heating apparatus, to be constructed and completed from plans and specifications
23 approved by parties of the first part within 8 months from the date hereof, for which construction and completion clear of mechanics liens or other incumbrances said party of the second part shall furnish a sufficient and satisfactory bond to the parties of the first part, and for the balance of said purchase price, Five Hundred Dollars ($500) the said party of the second part shall give his two (2) notes each for the sum of Two Hundred and Fifty Dollars ($250) with interest at six (6) per cent payable on or before one (1) year after date and secured by Second Deed of Trust upon two lots in said tract of land facing Brightwood Avenue upon which he is to erect houses similar to those herein described.

The said houses contracted for to be constructed as aforesaid, shall be delivered upon their completion to the parties of the first part as their property in fee simple and shall be free and clear of all incumbrances or liens.

It being mutually agreed that the title to said land shall be good of record or this Agreement void; parties of the first part to adjust all taxes and interest to date of delivery of Deed. Settlement to be made within thirty (30) days from the date hereof; delay thereafter at cost of delinquent party.

Witness our hands and seals this 27th day of November A. D., 1905.

OSCAR A. M. McKIMMIE. [SEAL.]
SIMON McKIMMIE. [SEAL.]
GEORGE P. HORTON, JR. [SEAL.]

Witness:
FERD. ESPEY.

24 DISTRICT OF COLUMBIA, *To-wit:*

I, Ferdinand Espey a Notary Public in and for the District of Columbia do hereby certify that Oscar A. M. McKimmie, Simon McKimmie and George P. Horton, Jr., parties to a certain Agreement bearing date on the 27th day of Nov. 1905, and hereto annexed, personally appeared before me in said District, the said Oscar A. M. McKimmie, Simon McKimmie and George P. Horton, Jr., being personally well known to me as the persons who executed the said agreement and acknowledged the same to be their act and deed.

Given under my hand and seal this 27th day of Nov. 1905.

[SEAL.] FERDINAND ESPEY,
Notary Public, D. C.

Whereupon the said defendants, Wilkinson and Kemp, by their attorney, admitted the execution and delivery of the said bond and agreement, but objected to their competency or admissibility in evidence under the amended declaration and pleadings in this case, said amended declaration, as contended by their said attorney being in form, neither in debt, covenant or assumpsit; and on the further ground that it appeared upon the face of said amended declaration that there had been a material variation of the terms of the bond and agreement (a part of said bond) by which the plaintiffs were to convey to George P. Horton, the principal obligor in said bond and agreement mentioned, less than the entire tract of land in said bond and agreement contracted to be conveyed, and, though
25 said variation of the said bond and agreement constituted a material alteration of the terms thereof, it did not appear upon the face of said amended declaration whether said variation of the terms of said bond and agreement was under seal or by parol, but the Court held that the amended declaration was sufficient and also that the distinctions between the various forms of action no longer existed in the District of Columbia and that any plain statement of a case by a plaintiff was sufficient and that the amended declaration in this case authorized the admission in evidence of said bond and agreement; and the Court held further as matter of law that the variation of the terms of the bond and agreement sued on by which the plaintiffs arranged with the principal obligor therein to convey to him less than the entire tract of ground in said bond and agreement mentioned and agreed to be conveyed to him, and the actual failure to convey to him the two lots in the amended declaration mentioned was not such a material variation of the terms of said bond and agreement as to discharge the defendants, Wilkinson and Kemp, from their obligation thereupon as sureties; and permitted said bond and agreement to be read in evidence to the jury, to which action of the Court in overruling their said objection to the competency or admissibility of said bond and agreement as evidence the defendants, Wilkinson and Kemp, by their attorney, then and there excepted, and prayed the Court to sign their bill of exceptions.

And the plaintiffs, further to maintain the issues on their part

joined against the said defendants, Wilkinson and Kemp,
26 called as a witness on their behalf the defendant Thomas J. Kemp and exhibited to him the two papers following, purporting to be extensions of the time within which the said George P. Horton, Jr., the principal obligor in said bond and agreement mentioned, was to fulfill the terms and conditions of the said agreement, which said two extensions are in the words and figures following,—

Know all men by these presents: That we, Thomas J. Kemp and Oscar Wilkinson, parties to a certain bond bearing date January 10th, 1906, and executed by us and George P. Horton, Junior, conditioned upon the faithful performance by the said George P Horton, Jr., of a certain contract with Oscar A. M. McKimmie and Simon McKimmie, said contract bearing date November 27th, 1905, do for and in consideration of one dollar to us in hand paid by the said Oscar A. M. McKimmie and Simon McKimmie, bind ourselves our heirs and executors, jointly with the said George P. Horton, Junior, in an affirmance of said bond and we for ourselves our heirs and assigns together with the principal of said bond, George P. Horton, Junior, do waive any and all rights which we might have had or hereafter may have by reason of an extension of the time for fulfillment of the contract hereinbefore mentioned on the part of the said George P. Horton, Junior, and affirm said bond up to and including the period from the 27th day of July A. D., 1906, to January 2nd, 1907.

The consideration for this obligation upon our part is the extension of time granted by the said Oscar A. M. McKimmie and
27 Simon McKimmie of the contractual limitation for the performance of the contract hereinbefore set forth for the completion of which in accordance with the terms of said contract, we and each of us are jointly and severally liable.

In testimony whereof we have hereunto set our hands and seals this 27th day of July A. D. 1906.

GEO. P. HORTON, Jr. [SEAL.]
THOMAS J. KEMP. [SEAL.]
OSCAR WILKINSON. [SEAL.]

Signed, sealed and delivered in my presence.

GEO. E. TERRY,
Notary Public, D. C.

Know all men by these presents: That we, Thomas J. Kemp and Oscar Wilkinson, parties to a certain bond bearing date January 10th, 1906, and executed by us and George P. Horton, Junior, conditioned upon the faithful performance by the said George P. Horton, Jr., of a certain contract with Oscar A. M. McKimmie and Simon McKimmie, said contract bearing date November 27th, 1905, do for and in consideration of one dollar to us in hand paid by the said Oscar A. M. McKimmie and Simon McKimmie, bind ourselves our heirs and executors, jointly with the said George P. Horton, Junior, in an affirmance of said bond and we for ourselves, our

heirs and assigns together with the principal of said bond, George P. Horton, Junior, do waive any and all rights which we might have had or hereafter may have by reason of an extension of the time for fulfillment of the contract hereinbefore mentioned on the
28 part of the said George P. Horton, Junior, and affirm said bond up to and including the period from the 27th day of July A. D., 1906, to May 2nd, 1907.

The consideration for this obligation upon our part is the extension of time granted by the said Oscar A. M. McKimmie and Simon McKimmie of the *contractural* limitation for the performance of the contract hereinbefore set forth for the completion of which in accordance with the terms of said contract, we and each of us are jointly and severally liable.

In testimony whereof we have hereunto set our hands and seals this 27th day of November A. D. 1906.

GEO. P. HORTON, Jr. [SEAL.]
T. J. KEMP, [SEAL.]
OSCAR WILKINSON. [SEAL.]

Signed, sealed and delivered in the presence of

[SEAL.] GEO. E. TERRY,
Notary Public, D. C.

And asked him whether he signed his name to said papers, and the said Kemp testified that, while the signatures looked like his he had no recollection of ever signing either of said papers, and that he had never signed any paper before George E. Terry, Notary Public, that he never signed his name "Thomas J. Kemp," but invariably signed it "T. J. Kemp."

And the plaintiffs thereupon called the defendant Oscar Wilkinson, and asked him as to the genuineness of his signatures to said two papers, purporting to be extensions and hereinbefore
29 fully set forth, and said Wilkinson testified that he had no recollection of signing either of said papers, that one of said papers looked like his genuine signature, to wit, the paper bearing date 27th of July, 1906, while that bearing date November 27th, 1906 did not look at all like his signature. Witness further testified that he never signed any paper with George E. Terry, Notary Public, as a witness, though he had signed papers witnessed by Seth A. Terry, Notary Public as witness.

Whereupon the said plaintiffs offered said two papers in evidence to which offer the said defendants, Wilkinson and Kemp, by their attorney, objected but the Court overruled their objection and permitted said papers to be read in evidence to the jury; to which action of the Court in overruling their said objection and permitting said two papers to be read to the jury, the said defendants then and there excepted, and prayed the Court to sign their bill of exceptions.

And the plaintiffs further to maintain the issues on their part joined with the defendants Wilkinson and Kemp, called as a witness WILLIAM E. AMBROSE, who testified that some time prior to the 7th

of March, 1907, at a conference at his office at which were present himself, the two plaintiffs, Herman W. Van Senden, the two defendants Wilkinson and Kemp, and Charles Poe, which conference was called by him because of George P. Horton's insolvency, the contract and bond in question were then in the office of the Recorder of Deeds, and that it was stated by some one that it was a lucky thing that the plaintiffs had not conveyed the two lots in question to Hor-
30 ton, that there was some discussion of that subject on that occasion about the conveyance of these two lots, but that he could not, however, state the nature of the discussion, as he did not remember the details.

Thereupon OSCAR A. M. MCKIMMIE, one of the plaintiffs, was called as a witness on behalf of the plaintiffs, and testified the plaintiffs owned the lots in question that some time after the execution of the bond, witness being unable to state either the month or day, but he knew it was some time prior to the limit of the original contract, he had several conversations with Dr. Wilkinson. Witness asked Wilkinson whether Horton was engaged in the erection of the building, as to the exact time, witness could not say. Could not say when he saw Dr. Kemp, knew he saw him concerning other business. Did not have conversation about this matter with Dr. Kemp, but saw Dr. Wilkinson every day or so, and the matter of these buildings was the subject of some of our conversations. Do not remember the details, but inquiry was made as to the progress that the principal in the contract was making. Dr. Wilkinson made the inquiry. It was before the expiration of the eight month period. Thinks he had a discussion with Dr. Kemp. Does not remember the time and cannot recall it. Was present at the conference at Mr. Ambrose's office. Conversation was on the question of what if anything Horton had done in performance of this contract before conveying to Van Senden. He did not build a house on each of the two lots. After a space of time the building contract was discussed very fully. Q. "Was anything said about the fact that these
31 two lots were not conveyed." A. "Statements were made by several persons present, and it was understood that they had not been conveyed." On cross-examination witness testified "We conveyed all the property, with the exception of two lots, which at Mr. Horton's suggestion we did not convey to him." "I said (in examination in chief) that so far as I knew positively, I am not sure that I ever had any permission from Dr. Kemp to exclude these two lots from the conveyance." Q. "Did you ever see Kemp between the date of the execution of the contract and the time you saw him in Mr. Ambrose's office in January, 1907." A. "I cannot recall, I saw him I know, but am unable to recall the place or time." Q. "Where did you ever converse with Dr. Wilkinson." A. "Dr. Wilkinson's office is on L Street near 14th, and during the Spring of 1906, at or near,—within the period of the original contract. I cannot give the language or date or place or time of the conversations with Dr. Wilkinson. I am not willing to swear to the statements he made." On redirect examination witness identified certain plans and specifi-

cations for the erection of seventeen houses by George P. Horton, Jr., said plans and specifications having been prepared by Nicholas T. Haller, an Architect, and on re-cross examination testified that he conversed about leaving out two lots. Remembers that that subject was discussed in detail, two lots joining. "I never had any conversation with Kemp about the two lots, not until the full conversation in Ambrose's office." Witness also testified on re-direct examination as to the value of said two lots with and without a house erected thereupon in accordance with the plans and specifications referred to.

32 Witness was thereupon made a witness for the defendants Wilkinson and Kemp, and was asked the following question, "Did you subdivide the lots mentioned in the agreement between you and Horton without consulting Kemp or Wilkinson?" to which question the plaintiffs by their counsel objected and the Court sustained their objection, to which action of the Court in sustaining said objection and refusing to permit the witness to answer said question, the defendants by their counsel then and there objected and prayed the court to sign this their bill of exceptions.

NICHOLAS T. HALLER, a witness for the plaintiffs testified that he was an Architect and drew the plans and specifications for these houses for George P. Horton who was to build them, that Horton never built them, never stuck a spade in the ground, that defendant Wilkinson was in his office frequently, some times as much as four times a week. Wilkinson knew that they (the plaintiffs) were holding the two lots and made no objection to the same. Never talked with Kemp about this matter, except once in Ford and Graham's Lunch Room, in the spring of 1906. Kemp was very anxious about Horton building these two houses for the McKimmies. Witness further testified as to the value of the two houses if built, placing the value of the two houses at Five Thousand Dollars ($5000) and their fair rental value at $25.00 a month apiece. On cross-examination witness stated that Wilkinson said that Dr. Kemp would look out for the McKimmies, and that they got what they were paying for it. McKimmies had given fifteen (15) lots for these two houses. Kemp simply urged him to build these houses. Kemp never

33 had conversation about these two lots. Witness also testified that he had had a quarrel with Wilkinson. Simon McKimmie, one of the plaintiffs testified that he was present at the conference at Ambrose's office and that there was some conversation there about the two lots, but he could not recall what it was. Everybody seemed to think it was fortunate that the two lots had not been conveyed to Horton. Also testified as to who were present at that conversation. Never had any conversation with Dr. Kemp on the subject of the two lots and cannot recall the time or place or language of any conversation with Dr. Wilkinson upon that subject. Did not get the two extension papers from Kemp or Wilkinson or from Terry, but got them from Horton. Was not present at the execution of either of these papers by Kemp or Wilkinson.

Whereupon the defendants Wilkinson and Kemp to maintain the issues on their part joined, called Dr. T. J. KEMP, who testified that

he knew the McKimmies. Knew George P. Horton, Jr. First met McKimmies in Ambrose's office in January, 1907. Never knew or talked with them about this transaction prior to that. Never talked with the McKimmies about these two lots. Never met Mr. Haller in Ford and Graham's in my life. Am positive about it. Q. "When did you first learn that these two lots had not in point of fact been conveyed by the McKimmies to Horton?" A. "At the time you (Mr. Poe) called my attention to this fact. Mr. George P. Hoover was my attorney before that time. It was when I brought you the declaration in this case that you told me that the McKimmies had never conveyed these two lots to Horton, and that was the first time I ever heard of it—heard the two lots had not been con-
34 veyed. Remembered the conference at Ambrose's office in January 1907. There was no conversation there about the two lots. We were called there because Horton had failed to keep his contracts, had fallen down on all his building contracts, and had made a deed to a man named Van Senden, of these lots which the McKimmies had deeded to him, and there was some talk about throwing Horton into bankruptcy, but there was no conversation about these two lots. I did receive on March 9th or 10th, 1907 the following letter written by William E. Ambrose to me.

MARCH 7TH, 1907.

Drs. Oscar Wilkinson & Thomas J. Kemp, Washington, D. C.

DEAR SIRS: I beg to notify you as counsel for Messrs. Oscar A. M. McKimmie and Simon McKimmie, and duly authorized by them, George P. Horton, Jr., one of the parties to a contract bearing date November 27th, 1905, for the performance of which contract, you and each of you, became sureties under a bond for the performance of said contract executed the 10th day of January, A. D., 1906, has not performed, or attempted to perform, his said contract, or any part thereof, or any of the covenants or agreements by him made or contained therein, and that the time for the performance of said contract, together with the extensions therein granted to him, and acceded to by you, has about elapsed. We therefore demand that the covenants of said contract be performed by you in
35 event of failure upon the part of the principal.

This letter is in pursuance of previous conversations had relative to this matter at various times.

Very respectfully, WM. E. AMBROSE.

mailed on the 9th day of March, 1907.

Never replied to it. Did not sign the extensions, always sign my name "T. J. Kemp". Never signed a paper before George E. Terry in my life. Do not believe it is Wilkinson's handwriting on these two papers,—do not believe it is his signature.

On cross-examination defendant Kemp swore the signature "Thomas J. Kemp" to the extension, dated July 27 1906 I did not sign, the one dated Nov. 27 1906 I did sign. Never signed any such paper before George E. Perry, Notary Public. Never signed

any paper before George E. Perry Notary Public. Told Horton I would not sign any more papers of any description for him. Did sign the Bond sued on before S. A. Terry, Notary Public. Oscar Wilkinson, one of the defendants, swore he had known Oscar McKimmie about six years, does not believe he knew Simon McKimmie before some time in 1906. Signed the bond for Horton. Never had any conversation with the McKimmies about the case after the signing of the bond. Was in Haller's office very frequently in 1905, but never discussed the matter of the transfer of these lots with him, nor did witness ever see the specifications or the plans. Never discussed it because I did not know the lots were not transferred. Asked as to signing the extension papers, witness testified "This one (indicating the paper dated 27th of July, 1906) the signature is like mine. I have no recollection of signing it. That signature looks like my signature. As to the second, (indicating the paper dated November 27th, 1906) I have no recollection and would not acknowledge it as my signature." Witness here examined papers and explained difference in signatures, and concluded by stating "those signatures speak for themselves."

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On cross-examination witness stated "the conference in Mr. Ambrose's office was primarily to see about putting Horton into bankruptcy. Did not remember any conversation there about the two lots. Horton never made any request of the witness to sign the extension papers." Q. "Did you or not sign these papers". A. "I do not remember signing either one".

HERMAN W. VAN SENDEN witness for defendant testified that Kemp, Wilkinson, the McKimmies, Ambrose, Poe and himself were present at the meeting in Ambrose's office, which was very informal. Witness came there at the request in writing of Mr. Ambrose. The fact that Horton had conveyed fifteen lots to me provoked the meeting. Did not recollect that anything was said about the two lots. Horton deeded the fifteen lots to me as security for debt. I afterwards bought the lots in under a sale made under a first Deed of Trust. Was notified of the meeting as one of Horton's creditors. The subject was Horton's delinquency on the Kenyon Street contract. Charles Poe testified that he was at the meeting at Ambrose's office, and that the complaint there was that Van Senden had taken a Deed to the lots that the McKimmies had conveyed to Horton. Could recall no suggestions that two of the lots had been omitted from the conveyance. On cross-examination testified that he was present there wholly in the interest of Van Senden whose attorney he was at that time

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In rebuttal the plaintiffs offered in evidence the following paper being a certified copy of a deed from them and their wives to George P. Horton, Jr., conveying to him fifteen (15) lots of ground therein described.

Deed.

Recorded Jan. 11th, 1906, 9:01 A. M.

Liber 2991, Folio 9 et seq.

Oscar A. M. McKimmie et ux. et al.

to

George P. Horton, Jr.

This deed, made this 27th day of December in the year one thousand nine hundred and five by and between Oscar A. M. McKimmie and Rebekah C. McKimmie, his wife, and Simon McKimmie and Nannie J. McKimmie, his wife, of the District of Columbia, parties of the first part and George P. Horton, Junior, of the same place. Witnesseth That in consideration of Ten ($10.00) Dollars, the parties of the first part do grant unto the party of the second part, in fee simple, all those pieces or parcels of land in the County of Washington, District of Columbia, described as follows, to wit: Lots numbered thirty nine (39) to Fifty-two (52) both inclusive, and lots numbered fifty-five (55) and Fifty-six (56) in Oscar A. M. Kimmie and others' subdivision of lots in Block numbered
38 nine (9) of Todd and Brown's subdivision of parts of Mount Pleasant and Pleasant Plains as per plat of said first subdivision recorded in Book County No. 20, page 105, in the office of the surveyor for the District of Columbia, together with the improvements rights, privileges and appurtenances to the same belonging. And the said parties of the first part covenant that they will warrant specially the property hereby conveyed and that they will execute such further assurances of said land as may be requisite. Witness our hands and seals the day and year hereinbefore written.

OSCAR A. M. McKIMMIE. [SEAL.]
REBEKAH C. McKIMMIE. [SEAL.]
SIMON McKIMMIE. [SEAL.]
NANNIE J. McKIMMIE. [SEAL.]

In presence of—
J. ALF. HAYWARD.

DISTRICT OF COLUMBIA, *To wit:*

I, J. Alf. Hayward, a Notary Public in and for the District of Columbia, do hereby certify that Oscar A. M. McKimmie and Rebekah C. McKimmie, his wife, and Simon McKimmie and Nannie J. McKimmie, his wife, parties to a certain Deed bearing date on the 27th day of December, 1905, and hereto annexed, personally appeared before me in said District, the said Oscar A. M. McKimmie, Rebekah C. McKimmie, Simon McKimmie and Nannie J. McKimmie, being personally well known to me as the persons who executed the said Deed, and acknowledged the same to be their act and deed.

Given under my hand and seal this 27th day of December, 1905.

J. ALF. HAYWARD,
Notary Public.

[NOTARIAL SEAL.]

39 OFFICE OF THE RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 2991 folio 9 et seq., one of the Land Records of the District of Columbia.

In testimony whereof, I have hereunto set my hand and affixed the seal of this office this 28th day of March, A. D. 1910.

[SEAL.] *Deputy Recorder of Deeds, D. C.*

And thereupon both parties rested their case, the aforegoing being all the evidence in the case. It being stipulated and agreed by and between said parties that the defendant George P. Horton, Jr., departed this life after he had been served with the summons in this case to appear as a defendant therein, that he never filed any plea or made any defense thereto, and that no issue ever was joined between him and the plaintiffs herein, and that on or about the 19th day of March, 1910, an order was filed herein by the plaintiffs through their attorney discontinuing this action against the said George P. Horton, Jr., and that no proceedings had been taken in this cause to make the personal representative of said deceased, George P. Horton, Jr., a party defendant to said cause.

Whereupon the defendants offered the four following prayers for instruction to the jury, the first three of which were re-
40 fused by the Court generally, the fourth being refused on the distinct ground that there was no material variation from the terms of the agreement and bond sued upon sufficient to discharge the defendants, Wilkinson and Kemp, from their obligation as sureties thereupon because of the failure by the plaintiffs to convey to Horton the two lots referred to in the amended declaration and the evidence in this cause, to which rulings of the Court in refusing their said four prayers for instructions to the jury, the defendants then and there excepted and prayed the Court to sign their bill of exceptions. Said prayers were in the following language.

Defendants' First Prayer.

The defendants pray the Court to instruct the Jury, that, upon the declaration in this case, the plaintiffs cannot recover against the defendants on the bond and agreement mentioned in the said declaration and offered in evidence, and their verdict, therefore must be for the defendants.

Defendants' Second Prayer.

The defendants pray the Court to instruct the Jury that their verdict must be for the defendant because there is no evidence legally sufficient to prove that the plaintiffs ever had a good title to the property mentioned in the bond and agreement sued on.

Defendants' Third Prayer.

The defendants pray the Court to instruct the Jury that their verdict must be for the defendants because there is no evi-
41 dence that the defendants or either of them ever authorized the plaintiffs to subdivide the property mentioned in the agreement and bond sued on before conveying the same to George P. Horton, Jr.

Defendants' Fourth Prayer.

The Court instructs the Jury to find for the defendants because there is no evidence legally sufficient to prove that the defendants or either of them authorized or consented to the convevance by the plaintiffs to George P. Horton, Jr., of less than the whole of the property mentioned in the agreement and bond sued on.

And thereupon the Court charged the Jury in the following language:

Charge to the Jury.

The COURT: Gentlemen of the jury, the plaintiffs are suing the defendants Kemp and Wilkinson as sureties upon Horton's bond. This was the situation so far as the parties agree about it; Horton had made a contract with the plaintiffs, McKimmie Brothers, whereby he agreed to place two houses, one house on each of two lots, the two lots that there has been controversy here before you, over their not having been conveyed to Horton under the contract. It is conceded that Horton failed to carry out that agreement with the McKimmie Brothers, that is, that he failed to construct either of those two houses that he agreed to construct in his contract, on either of the lots; and the parties and all of them further agree
42 that the two defendants Kemp and Wilkinson had gone surety on Horton's contract to construct those houses, and they are suing them here because of Horton's failure to construct the houses, endeavoring to enforce against those two sureties their liability on Horton's bond for the construction of the two houses.

The defences which the defendants have urged here are two in number. They claim, in the first place, that Horton and McKimmie, after having made the original contract between Horton and the McKimmies, changed that contract by extending the time which the original contract placed as the limit for its performance. They claim in addition to the fact that Horton and the McKimmies had agreed to extend the time for the completion of the building of the houses, that the two sureties did not know anything about that extension and did not agree to it.

Now the merit that lies in that contention is this, and I will illustrate it. When two parties, like the McKimmies and Horton, enter into a contract, and agree that certain things will be done and a third person becomes surety that that contract will be performed, then his contract is that the person for whom he becomes surety will carry out that very agreement that he has already made.

Now if the two original parties to the contract come together and make another agreement which takes the place of their first agreement, that wipes out the first agreement, and therefore there is nothing for the surety to be held on that he agreed to be held on, because the new agreement takes the place of the first agreement that is wiped out by changing it; and unless the surety consents
43 to the new agreement then he has not become surety for the new agreement and cannot be held liable.

So that the point of their defence in that aspect amounts to this: that they say they did not consent to the new agreement Horton and the McKimmies made on the point of extending the time of the original contract. Now if it is true that after the original contract was made Horton and the McKimmies came together and changed that original contract by extending the time in which it should be completed, then that would have released these sureties unless they consented to and assented to that extension of time. That is what makes the importance of these two writings that are in evidence; because the plaintiffs claim that those two writings, each of which is an extension of time, were actually signed by the defendants. But the defendants are urging the contention that they did not sign either of those two extensions; that they are forgeries, and that therefore there is no proof in the case that shows that they consented to the extension of the time for the completion of the original contract.

Now one of these papers that have been called extension papers, for convenience—one of those papers is dated the 27th day of July, 1906, and the other paper is dated the 27th day of November, 1906. You will have to look into the evidence in the case and determine from all the considerations that influence your minds upon that point, whether or not these defendants did actually sign those papers that purport to bear their signatures; because if they signed the paper dated July 27th, 1906, that paper shows in it a
44 provision that the original contract shall be extended; so that if they signed that, it shows that they assented to the first extension; and if they signed the second paper, the one dated November 27th, 1906, of course that shows that they agreed to the second extension because that paper if signed, itself is the second extension.

Therefore, if you find in favor of the plaintiffs on those points, that is to say that the defendants did actually sign those papers, the one dated July 27th 1906, then that would show that they consented to the first extension and wipes out that much of their defence. If you find that they signed the second paper, the one dated November 27th, 1906, that would prove that they did assent to and agree to the second extension, and therefore, there would be nothing left of this phase of their defence, which would avail them and the plaintiffs would be entitled to recover against them. The defendants, through their counsel, have urged another defence which in the judgment of the Court is of no consequence. I want to refer to it briefly, however, in order that you may understand certain special questions that the court will submit to you to answer. The other phase of the de-

fence which was urged on behalf of the defendants was this: They claim that because the McKimmies had not conveyed to Horton the two lots that the houses were to be built on, that that was a change in the original contract which released the sureties. The Court, however, is of the opinion as a matter of law, that that would not amount to a change of this original contract because this contract provides for the re-conveyance back to the McKimmies by Horton
45 of these very lots that the McKimmies agreed to convey to Horton; therefore, the Court is of the opinion, as a matter of law, that that cannot help these defendants toward releasing them.

Therefore, you can decide the case by your general verdict without having that general verdict influenced at all by the consideration that the McKimmies did not convey the lots to Horton. Your general verdict—that is to say your general finding whether the case ought to be decided in favor of the plaintiffs or the defendants will depend upon the considerations already submitted respecting those two extension papers. If the defendants signed the last of the two extension papers, that is to say, the one dated November 27th, 1906, then they are responsible to the plaintiffs, and your verdict ought to be a general verdict in favor of the plaintiffs. But in view of the subsequent proceedings that will be had in the case, the Court desires the benefit of the finding of the jury on certain questions of fact which are embraced in these special questions that the Court will submit to you to decide from the evidence. The evidence is already before the court and you are the tribunal whose function it is to decide the questions of fact. So that after you decide these special questions of fact, the Court, in the subsequent proceedings in the case, will have those facts settled; but if you do not decide these in this trial, then the Court could not tell what the facts were in that regard and it would be an embarrassment.

The first of these special questions is this; and they are plain enough for you to understand them without detailed ex-
46 planation: "Did the defendants sign the extension paper dated July 27th, 1906?" You are to decide that question from the evidence. If you find that they did sign the paper dated July 27th, have your foreman write "Yes" in that space which is opposite the place marked "Answer." If you find that they did not sign that then let him write "No" there.

The second question is: "If they did sign that paper dated July 27th 1906, then at the very time they signed it, on July 27th, did they know that those two lots had not been conveyed to Horton?" If you find that they then knew that the two lots had not been so conveyed, then your foreman should write the answer "Yes" in the space opposite that. If you find that they did not know that the lots had not been conveyed on July 27th 1906, let him write the answer "No."

The third question is: "Did they sign the extension paper dated November 27 1906?" If you find that they did, let the answer "Yes" be written below that question.

The fourth question is: "If they did sign the paper of November 27th did they at that time know that the two lots had not been conveyed to Horton?" Let your foreman write the appropriate answer

to that question, and then let him sign his name—just his name, not the names of all the jurymen, and let his name be signed at the bottom.

Now if you find, gentlemen, in favor of the plaintiffs—that is to say if you find that the defendants did sign those extension papers, and particularly the one of November 27th, then, in addition to answering these special findings you will render also a general
47 verdict in favor of the plaintiffs; that will involve the necessity of deciding how much in damages the plaintiff ought to recover. This bond on the face of it says that the recovery shall be $7,000. That is a mere arbitrary sum. The law does not permit the recovery of mere arbitrary sums that the parties fix in advance, because it is against public policy that one mon should be required to pay to another man through the judicial tribunals any sum greater than his actual damages; so the law only permits a recovery in this case to the extent of the actual damages that the plaintiffs can prove themselves to have sustained, independent of what figure the parties have arbitrarily written on the face of the bond. Therefore, you will have to lay aside that arbitrary figure of $7,000, that the bond states, and determine from the evidence what the actual damages are that the plaintiffs show from the evidence they have sustained through the failure of Horton to comply with his contract. That contract was to build two houses one on each of the two lots. He has not done it. Therefore if the verdict of this jury should be that the plaintiffs are entitled to recover, the amount of the verdict should be a sum which would put them in as good a situation financially as they would have been if Horton had put the two houses on the lots. If he had put the two houses on the lots, complete on May 2nd, 1907, the plaintiffs would have had the houses on the lots and would have been entitled to rental for the houses, or the use of them from May 2nd, 1907 up to the present time, but they have not had that. They have not had either the houses on the lots nor the use thereof. Therefore, the meas-
48 ure of their damages, if you find they are entitled to recover, would be first the difference between the value of the lots as they were without the houses and the value of the lots as they would have been on May 2nd, 1907 if those houses had been built there—the houses that are described in these plans and specifications. You would have to decide from the evidence the value of the lots without the houses on them upon that day, and then ascertain from the evidence the value of the lots with the houses on them at that date; and the difference between those two values would be the measure of damages in that one respect. Now inasmuch as, if the houses had been built on May 2nd, 1907, the plaintiffs would have had the right to use them, and therefore to enjoy the rental value of them from that time up to the present, if they are entitled to recover, they should have in addition to the difference between the value of the lots with the houses on them and without, the fair market value of the use of those houses from May 2nd, 1907 up to date—the date of your verdict.

Now the value of the use of a house is its rental value. Therefore,

in that phase of the question you will have to determine from the evidence the reasonable rental value of the houses from May 2nd, 1907 up to date.

You may take your exceptions, gentlemen.

Mr. POE: I think, if your Honor please, it ought to be the net rental value.

Mr. RIDOUT: How could that be? They have to pay taxes anyhow. That has got nothing to do with it. They have lost the taxes.

Mr. POE: I think with that exception, we desire to re-
49 serve an exception to the failure of the Court to use the words "net rental value from that date to the present time."

The COURT: I think the charge as given should stand. Now summarizing, gentlemen,—because these special interrogatories are not submitted to juries in every case,—you understand that you will render your general verdict in favor of the plaintiffs or the defendants, whichever way you find; if you find in favor of the plaintiffs, then the measure of the plaintiffs' damages is composed of two items; that is to say, the difference between the value of the lots with and without the houses, and, added to that, the rental value of the houses from May 2nd, 1907, up to the date of your verdict. That would be your general verdict. Then in addition to that, answer these special questions and have your foreman sign his name to the answers.

Mr. POE: I desire, if your Honor please, to request that the jury may be permitted to take these papers with them, the bond, the agreement and these two papers of extension, if there is no objection.

Mr. AMBROSE: There is absolutely none.

The COURT: The jury may take them.

The jury thereupon retired to consider of its verdict, and after such consideration returned to the court room and rendered a verdict in favor of the plaintiffs for $5736.72, and also answered the four questions propounded to them by the Court in the affirmative.

After the noting of the said exceptions hereinbefore set forth, and the making of the same a part of the record, which is also
50 made a part hereof, and because the matters and things hereinbefore recited which are not matters of record may be made to appear as matters of record, and in order that the defendants may have their case reviewed on appeal by the proper court, the defendants by their attorney move the court to sign this their Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed, which motion is by the Court granted; and thereupon the defendants tender this their Bill of Exceptions, and request the Court to sign the same according to the statute in such cases made and provided and it is accordingly done, now for then, this 6th day of June A. D. 1910.

DAN THEW WRIGHT, *Justice.*

Settled by agreement
CHAS. POE,
Att'y for Wilkinson & Kemp.
W. E. AMBROSE,
JOHN RIDOUT,
For Plaintiffs.

* * * * * * *

To Messrs. William E. Ambrose and John Ridout, Attorneys for Plaintiffs.

GENTLEMEN: I beg leave herewith to present a copy of the proposed Bill of Exceptions in the above entitled cause and to give notice that the same will be submitted to the Court to be settled on Friday the 27th day of May, 1910 at 10 o'clock A. M. or as soon
51 thereafter as counsel can be heard.

CHAS. POE,
Attorney for Defendants Wilkinson and Kemp.

Service of the above notice and copy of the bill of Exceptions accepted this 17th day of May, 1910.

JNO. RIDOUT,
W. E. AMBROSE,
Attorneys for Plaintiffs.

(Endorsed:) Sub. May 27/10. W.

52 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 51, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51527 at Law, wherein Oscar A. M. McKimmie, et al. are Plaintiffs and Oscar Wilkinson, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22d day of July, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2197. Oscar Wilkinson et al., appellants, vs. Oscar A. McKimmie. Court of Appeals, District of Columbia. Filed Jul- 26, 1910. Henry W. Hodges, clerk.

WEDNESDAY, *December 7th*, A. D. 1910.

No. 2197.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE.

The argument in the above entitled cause was commenced by Mr. Charles Poe, attorney for the appellants.

THURSDAY, *December 8th*, A. D. 1910.

No. 2197.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE.

The argument in the above entitled cause was continued by Mr. Charles Poe, attorney for the appellants, and by Mr. John Ridout, attorney for the appellees, and was concluded by Mr. Charles Poe, attorney for the appellants.

No. 2197.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court:

On November 27, 1906, Oscar A. and Simon McKimmie entered into a contract with George P. Horton whereby they covenanted to sell to Horton lots 27, 28, 29, and 30 in Todd and Brown's subdivision of Mount Pleasant and Pleasant Plains in the District of Columbia for the sum of $11,500. In consideration of said promise and the sum of $10, Horton agreed to purchase said land, promising to assume the payment of a mortgage of $3,000 on said property; to pay $1,000 on delivery of the deed; and to reconvey to the McKimmies two lots each sixteen feet and eight inches on Brightwood avenue (part of the above described lands), free of all incumbrances, liens, etc., first erecting on each a two-story brick dwelling complete according to plans and specifications approved by said parties; said houses to be completed within eight months from date. Said Horton also agreeing to give a satisfactory bond for the construction of said houses as stipulated. The contract was under seal. Under date of January 6, 1906, Horton as principal with Wilkinson

and Kemp as sureties, executed under seal, and delivered a bond to Oscar A. and Simon McKimmie binding themselves jointly and severally, in the sum of $7,000 for the faithful performance of the contract aforesaid.

On April 2, 1909, Oscar A. and Simon McKimmie brought an action against Horton, Wilkinson, and Kemp. The declaration set out the contract and bond aforesaid, and alleged the conveyance to Horton of the land aforesaid, except that "in lieu of conveying to him the two lots, each sixteen feet eight inches front on Brightwood avenue, the said plaintiffs, at the request of said Horton for the purpose of saving the expenses and inconvenience of a reconveyance, retained the title to the two lots mutually agreed upon and selected by them and the said Horton." It was further alleged that at the request of the said Horton and with the consent of said sureties the time for the performance of said agreement was extended for a period up to January 2, 1907, and thereafter upon request and upon consent as aforesaid, the time was further extended to May 2, 1907. It was further alleged that Horton had failed to perform said agreement by erecting said houses, whereby said lots were worth $7,000 less than they would have been had said houses been erected as agreed. Wilkinson and Kemp demurred to the declaration on the ground that it showed such a variation of the terms of the contract and bond as to release the sureties.

The demurrer was sustained by the justice then holding the circuit court, with leave to plaintiffs to amend. The amended declaration followed the original, but elaborated the allegation with regard to the extension of time, alleging that each extension was consented to by the sureties in writing. It was further alleged that prior to the consent to said extension of time the said sureties had actual notice of the fact that the two lots, each fronting sixteen feet eight inches on Brightwood avenue had not been conveyed by plaintiffs to said Horton.

Defendants pleaded: (1) That they were not indebted as alleged; (2) that defendant Horton had fully performed his agreement; (3) that plaintiffs were not injured by the failure of said Horton; (4) that defendants never had notice that the two lots fronting on Brightwood avenue had not been conveyed to Horton, and never consented to any extensions of time for performance by Horton as alleged; (5) that defendants never assented to the alteration or modification of the terms or conditions of the contract. Plaintiffs discontinued as to Horton, and joined issue on the said pleas.

Plaintiffs offered in evidence the contract and bond, the execution of which was admitted. Defendants objected to their competency under the amended declaration which was in form neither in debt, covenant, or assumpsit, as claimed by plaintiffs; and further, because it appeared on the face of the declaration that there had been a material variation of the terms of the bond and contract, and it did not appear whether the variation of said terms was under seal or by parol. The court overruled the objections, holding that the amended declaration was sufficient, and that the variation of the

terms of the contract by the failure to convey to Horton the part of the land included in the two Brightwood avenue lots was not a material variation of the terms of said contract and bond. Defendants excepted. Plaintiffs then offered in evidence two writings, of date respectively July 27, 1906, and November 27, 1906. Each contract, purporting to be signed by Horton and each surety, provided, upon a consideration, for extensions of the time of performance by Horton, the first to January 2, 1907, and the second to May 2, 1907. To the first extension agreement one of the signatures was "Thomas J. Kemp;" to the second "T. J. Kemp." Each extension agreement was attested as follows: "Signed, sealed, and delivered in the presence of." Signed: "Geo. E. Terry, Notary Public, D. C.," with seal attached.

Kemp, called as a witness by the plaintiffs, and asked if he signed his name to said papers, said that: "While the signatures looked like his, he had no recollection of ever signing either of said papers, and that he had never signed any paper before George E. Terry, notary public, and that he never signed his name 'Thomas J. Kemp,' but invariably signed it 'T. J. Kemp.' "

Wilkinson, called as a witness by plaintiffs, testified that "he had no recollection of signing either of said papers; that one of said papers looked like his genuine signature, to wit, the paper having date 27th of July, 1906, while that bearing date November 27, 1906, did not look at all like his signature." He said further that he never signed any paper with George E. Terry, notary public, as a witness. The papers were admitted in evidence over the objections of defendants, who excepted. W. E. Ambrose, attorney for plaintiffs, testified that on March 7, 1907, at a conference at his office, there were present, besides himself, Herman W. Van Senden, the two defendants, the plaintiffs, and Charles Poe. Said conference was called by him because of Horton's insolvency. It was stated by some one that it was a lucky thing that the plaintiffs had not conveyed the two lots in question to Horton. There was some discussion of that subject, the details of which he did not remember.

Oscar A. McKimmie, testified that he saw Wilkinson every day or so after the execution of the contract and talked about the progress of Horton. Was at the conference in Ambrose's office. Conversation was as to what Horton had done before conveying to Van Senden. Statements were made by several persons about the two lots not having been conveyed, and it was understood that they had not been conveyed. All the property was conveyed to Horton except the two lots, which was at his suggestion. Witness identified the plans and specifications for the erection of seventeen houses by Horton, and conversed about leaving out the two lots. That subject was discussed in detail, the two lots joining. Never had any conversation with Kemp about leaving out the two lots until the full conversation in Ambrose's office. He also testified to the value of the two lots with and without the houses. On cross-examination he was asked: "Did you subdivide the lots mentioned in the agreement without consulting Kemp or Wilkinson?" The court sustained plaintiff's objection to answering this question.

Haller, the architect, testified that he drew the plans and specifications of the houses for Horton, which were never built. Wilkinson was in his office frequently and knew that the plaintiffs were holding the two lots and made no objection to the same. Kemp was anxious about the building of the two houses for the McKimmies. Wilkinson said that Kemp would look out for the McKimmies and see that they got what they were paying for. McKimmies had given fifteen lots for these two houses. Kemp urged him to build these houses. Had no conversation with Kemp about the two lots.

Simon McKimmie testified that he was present at the conference in Ambrose's office, and there was some conversation about the two lots which he could not recall. Everybody seemed to think it fortunate that these two lots had not been conveyed to Horton. Did not get the extension papers from Kemp, Wilkinson, or Terry, but from Horton. Was not present at their execution.

Kemp, for defendants, testified that he first met the McKimmies in Ambrose's office in January, 1907. Never talked with them about these lots. First learned that they had not been conveyed from Mr. Poe when witness took him a copy of the declaration in this case. George P. Hoover had been his attorney before that. There was no conversation about the two lots at the conference. Defendants were called there because Horton had failed in his building contracts and had made a deed of the land, conveyed by plaintiffs, to Van Senden. There was some talk of throwing Horton into bankruptcy. Witness said that he received the following letter on March 9, 1907:

"MARCH 7TH, 1907.

"Drs. Oscar Wilkinson and Thomas J. Kemp, Washington, D. C.

"DEAR SIRS: I beg to notify you as counsel for Messrs. Oscar A. M. McKimmie and Simon McKimmie, and duly authorized by them, George P. Horton, Jr., one of the parties to a contract bearing date November 27th, 1905, for the performance of which contract, you and each of you, became sureties under a bond for the performance of said contract executed the 10th day of January, A. D. 1906, has not performed, or attempted to perform, his said contract, or any part thereof, or any of the covenants or agreements by him made or contained therein, and that the time for the performance of said contract, together with the extensions therein granted to him, and acceded to by you, has about elapsed. We, therefore, demand that the covenants of said contract be performed by you in event of failure upon the part of the principal.

"This letter is in pursuance of previous conversations had relative to this matter at various times.

"Very respectfully,

"WM. E. AMBROSE."

Made no reply to this letter. Did not sign the extension dated July 27, 1906; did sign that of November 26, 1906.

Oscar Wilkinson, for defendants, testified: Never had any conversation with plaintiffs after signing the bond. Was in Haller's office

frequently in 1905, but never discussed the matter of the transfer of these lots with him, and never saw the plans and specifications. Did not know the lots were not transferred. The signature on extension paper of July 27, 1906, looks like my signature, but have no recollection of signing it. As to the one of November 26 I have no recollection and would not acknowledge as my signature. Having explained the signatures he said: "Those signatures speak for themselves." Cross-examined he said the conference in Ambrose's office was primarily about putting Horton in bankruptcy. Did not remember conversation about the two lots. Asked: "Did you or not sign these papers?" (the extensions). He said: "I do not remember signing either one."

Van Senden testified that he was at the conference in Ambrose's office. Came at the request of Ambrose. The conveyance of the fifteen lots by Horton to him provoked the meeting. Had been conveyed to him as security. Afterwards bought them at a sale under a first deed of trust. The subject of conference was Horton's delinquency on the Kenyon street contract. Did not recollect that anything was said about the two lots.

Charles Poe testified that he attended the conference as Van Senden's attorney and wholly in his interest. Could recall no suggestion that the two lots had been omitted from the conveyance to Horton.

The defendants prayed the court to instruct the jury as follows: 1. Plaintiffs can not recover on the bond and agreement mentioned in the declaration and offered in evidence, and the verdict must be for the defendants. 2. The verdict must be for the defendants because there is no evidence to show that the plaintiffs ever had a good title to the property described in the contract. 3. Verdict must be for defendants because there is no evidence that defendants, or either of them, ever authorized the plaintiffs to subdivide the property. 4. Verdict must be for the defendants because there is no evidence legally sufficient to show that defendants, or either of them, authorized or consented to the conveyance to Horton of less than the whole of the property.

These were refused, with exceptions reserved.

In the general charge the court explained the issues to the jury in language that was not excepted to, and charged them, if they found that defendants executed the two extension papers, the plaintiff would be entitled to recover on that issue. In regard to the failure to convey the two lots to Horton, the court charged the jury that as a matter of law, it was not such a change in the contract as would release the sureties. He, however, submitted four special issues: 1. Did the defendants sign the extension agreement of July 27, 1906? 2. Did they then know that the two lots had been conveyed to Horton? 3. Did they sign the paper of November 26, 1906? 4. Did they then know that the two lots had not been conveyed to Horton? He then charged the jury as to the measure of damages in case of finding for plaintiffs. In stating the ground of recovery on account of the rental value of the houses, defendants' counsel excepted, because of the word "net" before rental value.

No other exception was noted. At request of defendants and with consent of plaintiffs, the jury were permitted to take with them the contract, bond, and the two extension papers. The jury answered "yes" to each of the special issues submitted and returned a general verdict for plaintiffs for $5,736.72.

Defendants moved in arrest of judgment: 1. Because the action is against but two of the three joint and several obligors on the bond. 2. Because the action has been discontinued against one of the three joint and several obligors. 3. Because though one of the three joint and several obligors has died since the institution of this suit, plaintiffs have failed to make his personal representative a party defendant. 4. Because the declaration shows upon its face that the bond sued on was altered and amended by parol agreement of the parties subsequent to its execution under seal. The motion was overruled and judgment entered on the verdict for $5,736.72.

From this defendants have appealed.

There are nineteen assignments of error in this case, some of which have been argued together. Under the first group the contention is, that while the declaration counts upon the contract and bond under seal to a certain point, and that far sounds in debt, it does not stop there, but proceeds to allege the alteration of the contract in respect of the change in excepting the two lots from the conveyance to Horton, and in respect of the extensions of time for completion, without alleging that the said alterations were under seal.

For this reason it is contended that the declaration sounds in assumpsit, and the instruments under seal are not admissible thereunder. We perceive no merit in this contention. The declaration complies with rule 27 of the Supreme Court of the District, in that it contains a plain statement of the facts necessary to constitute the cause of action, and is substantially in the form of covenant. It sets out the contract and bond under seal and the breach of the obligation. In anticipation of the defense founded on the extension of the time for performance it alleges the consent of defendants thereto. The action is on the bond given for the performance of the contract that was not performed. The liability of the sureties would be discharged by the extension unless it could be shown that they had consented thereto. It was proper and necessary to allege this consent in order to recover on the bond. No additional claim was founded on those instruments. In this respect the declaration was similar to those in two of the cases relied on by defendants—the first in support of this contention and the second on the question of discharge by reason of the alteration of the contract in the matter of the omission to convey the two lots. Phillips, etc., Construction Co. v. Seymour, 91 U. S., 646-652; U. S. v. Freel, 186 U. S., 309-310. Phillips v. Seymour was an action of covenant for part performance of a contract under seal, the complete performance of which in time had been prevented by the defendant. An additional recovery was had on a special finding by the jury upon evidence of extra work done under an additional parol agreement.

The court said: "There is no allegation of this promise in the declaration which is an action of covenant on the sealed agreement.

There is no allusion to it, or provision for it, in that instrument. It is found by the special verdict to be a promise, and the record shows it was by parol." It was held that assumpsit would be the proper action on this promise and that it could not have been joined, if attempted, with the action of covenant, under the common law rules of pleading prevailing in the State where the action had been brought. Judgment on the special verdict was reversed, but that founded on the sealed contract with proof of waiver of performance in time was affirmed.

Nor do we coincide with the view that the sureties were discharged by the change in the performance of the contract by which the two lots were excepted from the conveyance to Horton. A material change in a contract with a principal without the assent of the surety, even though it may prove to his advantage, discharges the latter. But an immaterial change that does not put the surety in a position different from that he before occupied, has no such effect. Roach v. Summers, 20 Wall., 165-169; Cross v. Allen, 141 U. S., 528-537; The Beaconsfield, 158 U. S., 303-312.

The exclusion of the two lots from the conveyance to Horton, at his suggestion, was a mere matter of convenience that worked no change in the positions, rights or obligations of the parties.

In form the contract was to convey the whole of the land to Horton, who was to reconvey the two lots and erect certain houses upon them, the same to be free of any and all liens and incumbrances. Its real effect was that Horton was to have title to the remainder of the land in consideration of his erecting the two houses on the lots for plaintiff. Notwithstanding the form of the contract, upon conveyance of the whole the equitable title to this part would remain in the plaintiffs.

The defendants' second prayer was properly refused, because it was not necessary that plaintiffs should prove that they had a good title to the land described, the same not having been put in issue or even questioned. Nor was it necessary to prove authority for the subdivision of the property into the small lots upon which Horton intended to erect a series of houses. The two small lots to be reconveyed to plaintiffs were expressly provided for. It was not error to submit to the jury the consideration of the evidence regarding the execution of the two extension agreements. Kemp admitted that he signed the latter paper and would not say positively that he did not sign the other. Nor did Wilkinson deny the execution of either; he did not recollect the fact. One signature looked like his; the other he would not acknowledge as his. He compared them with signatures to the other papers, and said "those signatures speak for themselves." That he relied upon an apparent difference between these several signatures is shown by the request of his counsel that the jury should take all of the signed papers with them for consideration. Moreover, the letter of Ambrose notifying them of the default of Horton and of the near approach of the expiration of the extension acceded to by them, was not responded to or denied. While the testimony was meager, we think it was sufficient to be submitted to the jury, who specially found that they executed each

paper, and also that they had knowledge of the omission to convey the two lots to Horton, when each was executed.

That the action was discontinued as to Horton, who it seems had become insolvent, presents no ground for arresting the judgment. Section 1211 of the Code simply provides that one action may be sustained and judgment recovered against all or any joint and several obligors. It does not require that this shall be done. We have considered all of the points involved, without separately noting the several unnecessary assignments of error, and find no ground for reversal. The judgment will therefore be affirmed with costs.

Affirmed.

No. 2197, January Term, 1911.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE.

Appeal from the Supreme Court of the District of Columbia.

MONDAY, *February 6th, A. D.* 1911.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

PER MR. CHIEF JUSTICE SHEPARD,
February 6, 1911.

No. 2197.

OSCAR WILKINSON and THOMAS J. KEMP, Appellants,
vs.
OSCAR A. M. MCKIMMIE and SIMON MCKIMMIE.

THURSDAY, *February 9th, A. D.* 1911.

On motion of Mr. Charles Poe, attorney for the appellants, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of ten thousand dollars, and the bond for costs is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Becaue in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Oscar Wilkinson and Thomas J. Kemp, Appellants, and Oscar A. M. McKimmie and Simon McKim-

mie, Appellees, a manifest error hath happened, to the great damage of the said Appellants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 9th day of February, in the year of our Lord one thousand nine hundred and eleven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

——— ———.

(Bond on Writ of Error.)

Know all Men by these Presents, That we, Oscar Wilkinson and Thos. J. Kemp, as principals, and A. J. Shippert, as surety, are held and firmly bound unto Oscar A. M. McKimmie and Simon McKimmie in the full and just sum of three hundred dollars to be paid to the said Oscar A. M. McKimmie and Simon McKimmie, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of March, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between said Oscar Wilkinson and Thos. J. Kemp as appellants and said Oscar A. M. McKimmie & Simon McKimmie as appellees a judgment was rendered against the said Wilkinson & Kemp and the said Wilkinson and Kemp having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Oscar A. M. McKimmie and Simon McKimmie, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Oscar Wilkinson & Thos. J. Kemp shall prosecute said writ of error to effect, and answer all costs if they fail to make — plea

good, then the above obligation to be void; else to remain in full force and virtue.

A. J. SHIPPERT. [SEAL.]
OSCAR WILKINSON. [SEAL.]
THOS. J. KEMP. [SEAL.]
A. J. SHIPPERT. [SEAL.]

Sealed and delivered in the presence of—

CHAS. POE.

Approved by:

SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA, *ss:*

To Oscar A. M. McKimmie and Simon McKimmie, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Oscar Wilkinson and Thomas J. Kemp are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 29th day of March, in the year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Mar. 29th, 1911.

W. E. AMBROSE,
JOHN RIDOUT,
Counsel for Plaintiffs in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 29, 1911. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 37 inclusive contain a true copy of the transcript of record and proceedings of said Court of

Appeals in the case of Oscar Wilkinson and Thomas J. Kemp, appellants, vs. Oscar A. M. McKimmie and Simon McKimmie, No. 2197, January Term, 1911, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 29th day of March A. D. 1911.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,640. District of Columbia Court of Appeals. Term No. 273. Oscar Wilkinson and Thomas J. Kemp, plaintiffs in error, vs. Oscar A. M. McKimmie and Simon McKimmie. Filed April 26th, 1911. File No. 22,640.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 273.

OSCAR WILKINSON AND THOMAS J. KEMP,
Plaintiffs in Error,
vs.
OSCAR A. M. MCKIMMIE AND SIMON MCKIMMIE,
Defendants in Error.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This case comes here on writ of error to the Court of Appeals of the District of Columbia sued out by Oscar Wilkinson and Thomas J. Kemp to review and reverse a judgment of that Court, which affirmed a judgment of the Supreme Court of the District of Columbia, entered against them on the verdict of a jury. (Rec., p. 35.)

STATEMENT.

On the 27th day of November, A. D. 1905, the defendants in error, who were plaintiffs in the court below, entered into an agreement with George P. Horton, Jr., who was a builder, to sell him lots 27, 28, 29 and 30, in block 9, in Todd and Brown subdivision of Mount Pleasant and Pleasant Plains, for the sum of $11,500.00. Horton was to pay the defendants in error as the consideration for the conveyance to him of said lots in the following way: He was to assume and pay an indebtedness of $3,000.00, to pay $1,000.00 in cash upon the delivery of the deed, and was to reconvey to the defendants in error two lots, each 16 feet, 8 inches front, on Brightwood Avenue (part of the land above described) free and clear of all incumbrances and to erect on each a two-story brick dwelling, constructed and completed from plans and specifications approved by the defendants in error, within eight months from the date of said agreement, and was to give his two notes for $250.00 each, secured by a second deed of trust for the remaining $500.00 of the purchase money. This agreement is set out in full on pages 11 and 12 of the Record.

On the 27th day of December, 1905, the defendants in error and their wives executed and delivered to Horton a deed, which purports to convey to him "lots number 39 to 52, both inclusive, and lots 55 and 56 in Oscar A. M. McKimmie and others' subdivision of lots in block number 9 of Todd and Brown subdivision of part of Mount Pleasant and Pleasant Plains, as per plat of said subdivision recorded in book county No. 20, page 105, in the office of the surveyor of the District of Columbia." This deed is to be found on page 20 of the Record.

On the 10th day of January, 1906, Horton, as principal, and the plaintiffs in error, as sureties, entered into a bond

to the defendants in error conditioned for the faithful performance by Horton of the terms and conditions of the agreement between him and the defendants in error. (Record, pp. 10 and 11.)

Horton did not carry out his contract and this suit was instituted against him and the plaintiffs in error by the filing of a declaration in the lower court on April 2, 1909 (Rec., pp. 1 and 2). This declaration sets forth the bond and recites the agreement and then states as follows:

> "And plaintiffs say that they conveyed to said Horton the said real estate described in said agreement except that in lieu of conveying to him the two lots, each 16 feet 8 inches front on Brightwood avenue, the said plaintiffs at the request of said Horton for the purpose of saving the expense and inconvenience of reconveyance retained the title to the two such lots mutually agreed upon and selected by them and the said Horton."

> "And the plaintiffs further say that at the request of the said Horton and with the consent of said sureties the time for performance of said agreement was extended for a period, up to January 2, 1907, and thereafter at the request of said Horton and with the consent of said sureties the time for fulfillment of said contract was further extended for a period up to May 2, 1907." (Rec., p. 2, par. 3.)

To this declaration the plaintiffs in error filed a demurrer, accompanied by the following memorandum (Rec., p. 3):

> "One of the questions of law intended to be presented by the above demurrer is whether there has not been such a variation of the terms of the contract and bond sued upon as to release and discharge the defendants, Oscar Wilkinson and Thomas J. Kemp, from any liability thereupon." (Rec., p. 3.)

This demurrer was sustained by Mr. Chief Justice Clabaugh, with leave to the plaintiffs to file an amended declaration herein as advised (Rec., p. 4), and on May 5, 1909, the plaintiffs filed an amended declaration in which, after reciting the bond, agreement, their failure to convey the two lots to Horton and the two alleged extensions of time, in which he was to fulfil his contract, they make this additional allegation:

> "And the plaintiffs further say that prior to the making of said extensions the said sureties had actual notice of the fact that the said two lots each fronting 16 feet 8 inches on Brightwood avenue, had not been conveyed by plaintiffs to said Horton, and with such actual knowledge not only assented to the extensions aforesaid but expressly affirmed their liability under the said writing obligatory dated January 10, 1906."

They then set forth in their amended declaration as their damages the difference betwen the value of these two lots, with houses upon them, and without houses upon them, and they claim seven thousand dollars ($7,000.00), which is the amount of the penalty named in the bond (Rec., pp. 4 and 5). To this amended declaration the plaintiffs in error pleaded five pleas (Rec., p. 6), and the issues were then made up. Your Honors will thus observe that in entering the judgment *sustaining the demurrer*, his Honor Chief Justice Clabaugh established it as the law of this case that the failure to convey the two lots to Horton was a material variation of the terms of the contract and discharged the sureties from liability thereon.

U. S. vs. Freel, 186 U. S., 309, same case, 46 Fed. Rep., 1177.

Whether the Chief Justice ruled correctly or not upon this point is immaterial. His was a ruling *sustaining*—not overruling—a demurrer and was acquiesced in, and not appealed from, and an amended declaration filed in consequence of it. It is the law of this case for all time. Upon this point this court, in Ferguson, Executor of Clearwater, vs. Meredith, 1 Wallace, 25, says:

> "Where a party pleads *de novo* after a demurrer was sustained to his original pleading, he waives any right he may have to question the correctness of the decision of the court on the demurrer."

> "Whether the former decision was right or wrong or was induced by the want of the particular evidence that was offered in the present case was not the question. However that might be, it was final and put an end to the litigation."
>
> New Orleans vs. Bank, 167 U. S., 371.
>
> Werlein vs. New Orleans, 177 U. S., 390.

Section 1533 of the Code D. C., provides that where a *demurrer* is *overruled* the party may plead over without waiving his rights, but that section does not apply to a case where the demurrer is *sustained* and the unsuccessful party acquiesces in the correctness of the ruling, takes no appeal therefrom and reserves no exception thereto.

The action of the trial judge with reference to this point at the trial of the cause on its merits has induced us to set out thus fully in this statement of facts the law applicable to this point of pleading as we understand it to be.

At the trial the plaintiffs offered in evidence the bond and agreement sued upon and the defendants, while admitting their execution and delivery, objected to their admissibility or competency as proof under the declaration, they being sealed instruments and the declaration being, as was

contended, neither in debt or covenant, but the learned judge (Mr. Justice Wright) overruled this objection on the distinct ground that the rules of court had abolished the distinction between the forms of actions in the District of Columbia. The court also held that the failure by plaintiffs in error to convey the two lots of ground, whether with or without the consent of the sureties on the bond, was not such a material variation of its terms as to discharge the plaintiffs in error from their liability thereupon as sureties.

Notwithstanding this ruling that the modification of the contract was not an essential one, the court, at the same time, submitted to the jury four special interrogatories to be answered by them (Rec., p. 7), telling them, however, at the same time, that they could decide the case by their general verdict without having that general verdict influenced at all by the consideration that the McKimmies did not convey the lots to Horton (Rec., p. 24, par. 2).

After the suit was instituted the defendant Horton was duly summoned, but it does not appear from the Record that he ever appeared and filed pleas, nor does it appear that any judgment by default was ever entered against him. The only thing that does appear with reference to him is that, shortly before this case was put on trial, and after Horton's death, it was discontinued as to him (Rec., p. 6), and it is stipulated in the bill of exceptions (Rec., p. 21), that no proceedings had been taken in this cause to make the personal representatives of said deceased, George P. Horton, Jr., a party defendant to the cause.

The jury returned a verdict for the plantiffs for $5,736.72; the defendants filed motions for new trial and in arrest of judgment (Rec., pp. 7 and 8), these were overruled, and judgment entered upon the verdict, and from this judgment an appeal was prosecuted to the Court of Appeals, where the judgment was affirmed.

Assignment of Errors.

The trial court below erred in:

First. Admitting in evidence and permitting to be read to the jury the bond and agreement referred to, because the same was incompetent under the declaration and pleadings in the cause.

Second. In admitting in evidence the two papers called "Extensions" because there was no evidence legally sufficient to prove that they were ever executed or delivered by the appellants.

Third. In admitting said "Extensions" in evidence because the attesting witness thereto was not called to prove the execution and delivery thereof, and the failure to call him was not explained.

Fourth. In ruling that the failure to convey to Horton the two lots mentioned in the declaration was not a material variation of the terms of the bond and agreement sued on.

Fifth. In not following the ruling of Chief Justice Clabaugh that such failure to convey said two lots was a material variation and released and discharged the appellants from liability as sureties.

Sixth. In ruling that the distinction between the forms of action no longer prevails in this jurisdiction.

Seventh. In submitting the four special interrogatories to the jury—though holding that the answer thereto was not pertinent to any issue involved in the cause.

Eighth. In refusing to rule that there was no evidence that the appellants ever assented to the alleged

agreement between the appellees and Horton that the appellees should retain title to the two lots referred to in the declaration.

Ninth. In refusing to grant the first prayer of the appellants.

Tenth. In refusing to grant the second prayer.

Eleventh. In refusing to grant the third prayer.

Twelfth. In refusing to grant the fourth prayer, and stating that the ground of said refusal was that there had been no material variation of the agreement and bond by the failure to convey said two lots.

Thirteenth. In submitting the case to the jury.

Fourteenth. In sustaining the objection interposed by appellees to the question: "Did you subdivide the lots mentioned in the agreement without consulting the defendants, Wilkinson and Kemp?" propounded to the appellee, Oscar A. M. McKimmie. (Rec., p. 17.)

Fifteenth. In overruling the motion for a new trial.

Sixteenth. In overruling the motion in arrest of judgment.

Seventeenth. In refusing to rule that the personal representative of George P. Horton, Jr., was a necessary party.

Eighteenth. In refusing to rule that it is error to sue more than one and less than all the parties to an instrument the obligation of which is joint and several.

Nineteenth. In entering judgment upon the verdict.

And the Court of Appeals erred in affirming these rulings and the judgment.

Argument.

The first, sixth and ninth assignments of error relate to the right of the defendants in error to recover at all in this action upon the amended declaration and may be considered together. The first assignment of error relates to the admissibility of a sealed instrument under a declaration in assumpsit. The sixth relates to the ruling of the court that the distinction between forms of actions no longer prevails here, and the ninth relates to the refusal of the court to instruct the jury that their verdict must be for the plaintiffs in error upon the pleading and evidence in the cause. The amended declaration counts upon a bond and agreement, under seal, up to a certain point in it, and the breach of the condition thereof, and if the grievance of which the defendants in error complain had been only that; and the declaration had stopped there with the claim for $7,000.00, the penalty of the bond, unquestionably it would have sounded in debt, debt being "an action brought for the recovery of a sum certain *co nomine* and *in numero,*" but the declaration does not stop there, but proceeds to state that the principals, both obligors and the obligee (Horton) altered the terms of the sealed instrument in two respects; first by the enlargement of the time for the performance of the contract by Horton, and, second, by the mutual agreement between Horton and the defendants in error that the defendants in error might retain title to two of the lots agreed to be conveyed, without stating whether said enlargement of time and alteration of terms was by instrument under seal, or not under seal.

By this additional allegation the declaration ceased to be one in debt. It did not thus, however, become one in covenant, for *"Covenant is an action brought for the recovery of unliquidated damages for the breach of a contract under seal."*, and the contracts here set up are partly under seal and partly not under seal.

If the declaration taken as a whole sounds *in assumpsit* the bond and agreement, being under seal, were not competent or admissible thereunder.

Magruder vs. Belt, 7 Appeals, D. C., 303.
Clark vs. Harmer, 5 Appeals, D. C., 114-119.

> "A sealed instrument is not admissible in evidence in an action of *assumpsit.*"

The distinction between the various forms of action, as recognized at common law, still prevails in the District of Columbia.

Miller vs. Ambrose, 35 Appeals, D. C., 75.

> "While sec. 1 of common-law rule 26, of the lower court, providing that prolixity and unnecessary verbiage shall be avoided in all pleadings, was designed to simplify the forms of pleading and do away with unnecessary verbiage, it was not intended to abolish the common-law forms of action; and in declaring upon them it is still incumbent upon the pleader to set out the essential averments of such causes of action."

We desire briefly to call the court's attention to some of the decisions upon the question in cases arising upon contracts similar to the one now before Your Honors. We may be pardoned if we begin by a brief quotation from Poe on Pleading and the authorities there cited.

> "Recovery cannot be had in an action of covenant unless the special agreement declared on is shown to have been performed by the plaintiff according to its terms. Thus, where plaintiff covenanted to build two houses for 500 pounds by a certain day, and averred in an action of covenant for the money that the houses were built within the time, evidence that the time had

been enlarged by a subsequent parol agreement, and the houses finished within the enlarged time, did not support the declaration."

Littler vs. Holland, 3 Term. Rep., 592.
Heard vs. Wadham, 1 East, 630.
Watchman vs. Bratt, 5 G. & J., 239.
Franklin Fire Ins. Co. vs. Hamil, 5 Md., 170.

In Dermott vs. Jones, 23 Howard, 220, on appeal from the old Court in General Term, the question arose on a contract under seal, to erect improvements at the corner of Seventh Street and Pennsylvania Avenue, and the case turned entirely upon this question of pleading, and was reversed by the Supreme Court of the United States because the plaintiff had been allowed to recover upon a declaration based upon a contract under seal, the terms of which had been varied by the parties. On a second trial the plaintiff again prevailed and the case again went to the Supreme Court of the United States where it was again reversed, and the rule laid down as follows:

"Where a plaintiff has in good faith fulfilled, but not in the manner and within the time prescribed by the contract and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit.*"

Dermott vs. Jones, 2 Wallace, 1.

To the same effect:

U. S. vs. Malloy, 144 Fed., 323.
O'Dea vs. Winona, 41 Minn., 429.
Lee vs. New Haven, 15 Fed. Cas., 219.
Bowen vs. Morrise, 83 N. C., 257.
Mansur vs. Botts, 80 Mo., 655.
Bibb vs. Allen, 149 U. S., 499.
North vs. Straus, 94 Md., 317, and 112 Missouri App., 189-190.

We desire to call the court's attention especially to the case of Phillips and Colby Construction Co. vs. Seymour, 91 U. S., 646 (23 Rep. Ed., p. 341). This case arose on a contract to build a railroad, and the court held that under the common law system of pleading the plaintiff cannot join the actions of covenant and assumpsit. In the statement of facts contained in the opinion of Mr. Justice Miller in that case Your Honors will observe that the trial judge attempted to cure the errors of his ruling by submitting to the jury special interrogatories to be answered by them just as the learned trial judge in the case at bar attempted to do, but, notwithstanding this, and the special finding of facts by the jury in that case the Supreme Court, speaking through Mr. Justice Miller, held itself to be bound by the common law rules of pleading. We make the following extract from the opinion in that case:

> "It seems reasonable that the claim for this extra costs should be decided in the suit in which the other compensation for the same work is recovered; that plaintiffs, having proved their case and recovered a verdict, should not be compelled to resort to a new suit in which this verdict would stand for nothing. Only a rule of pleading stands in the way, in this court, in doing what the very right of the case requires. We can give the plaintiffs the judgment for the amount of the general verdict, and reject this; or we can do complete justice, and affirm the judgment of the Circuit Court in full.
>
> "But the State of Illinois has adhered to the system of pleading which recognizes the line that separates the forms of action at common law, and the Act of Congress requires the Circuit Courts to conform to the mode of pleading of the States in which the court sits. Undoubtedly there was error under that system in admitting proof of a parol contract of this kind in an action of covenant; and as the defendant

made this precise objection, and took an exception when overruled, we do not see how we can refuse to give it the benefit of its objection. In those States where the distinctions between the forms of actions have been abolished, the declaration could have been amended and the two matters joined in the same action. In that case, we might, under the Statute of Jeofails, disregard the error, as one capable of removal by amendment below and as cured by verdict and judgment when it comes here.

"By Section 954 of the Revised Statutes which was Section 32 of the Judiciary Act of 1789 (1 Stat. L., 73), was founded on the English Statute of 32, Henry VIII, and is no broader. This Act of Congress has been frequently construed by this court in such a manner as to forbid its application to the case before us. Garland vs. Davis, 4 How., 131; Stockton vs. Bishop, 4 How., 155; Jackson vs. Ashton, 10 Pet., 480.

"There is no room here for amendment. There could have been none in the court below. To allow a verdict to stand which is responsive to no issue made by the pleadings or which could have been made by any pleading in that action, is further than we can go in the promotion of abstract justice.

"The judgment of the Circuit Court must be reversed, with directions to the court below to set aside the special verdict of the jury for the $11,708.00, and to enter a judgment in favor of the plaintiff on the general verdict of $107,353.44, with interest from the date it was rendered; and the plaintiff in error is to recover costs in this court.

"If, however, the defendant in error shall, within a reasonable time within the present term of this court, file in the circuit court a remittitur of so much of the judgment of that court in their favor as is based on the special verdict, and produce here a certified copy of the remittitur, the judgment of that court will be affirmed."

These cases, most of which were upon building contracts, will serve to show that where a contract under seal has been modified by the parties, proper action upon it is an action of *indebitatus assumpsit* on the common counts, as well as that an obligation to observe the rules of pleading and the distinctions between the various forms of actions must be noted and obeyed. Some of them will also show that even where an attempt has been made by statute to abolish these distinctions and forms and to substitute for them what is familiarly called a "plain statement of facts," the courts themselves still continue to be bound by them and will not destroy the landmarks.

Stirling vs. Garrittee, 18 Md., 468.
Miller vs. Ambrose, 35 Appeals, D. C., 75.

While Section 1532 of the Code provides for the joinder of different claims in the same action, it carefully provides that such claims must be made in separate counts, so that while at common law you could not join the different forms of actions in the same suit, now, under the Code, you may join them in the same suit, provided you separate them into different counts, but cannot join two forms of actions in the same count. This shows that the Code itself recognizes the fact that the distinction between the various forms of action still exists in the District of Columbia, and the case of Miller vs. Ambrose, *supra,* shows that the courts observe the distinction in the construction of its own rules.

The fourth, fifth, seventh, eighth and twelfth assignments of error may be considered together as they all relate to the action of the court in ruling that the failure by the defendants in error to convey the two lots was not such a material variation of the contract as to discharge the plaintiffs in error as sureties. For two reasons the lower court was in error in so holding.

First. In the same action between the same parties the identical question had been determined by Mr. Chief Justice Clabaugh when he sustained the demurrer to the original declaration. This question has been sufficiently enlarged upon in the statement of the case where the authorities are cited and reviewed.

Second. But, in point of fact and of law, the variation of the terms of the contract was a material variation. Here was a builder buying property upon which to erect improvements and, as part of the consideration for his purchase, he was to build houses on two of the lots conveyed and hand the completed houses back to the owners free of encumbrances. Here are two friends who become sureties for the faithful performance of this contract by the builder. Is it to be said that it was not of material consequence to the builder that he should have title to the property upon which he was about to build? His title to the property in all probability was the basis, and the only basis, upon which he could obtain material and labor, or credit for material and labor to be laid out in the consummation of the contract itself. The fact that he was to have the title may have been the inducement to his two friends, the plaintiffs in error, to become his sureties. The whole subject has been recently reviewed by this court in an exhaustive opinion by Mr. Justice Shiras in the case of U. S. vs. Freel, 186 U. S., 309 (46 L. Ed., 1177).

An additional word here as to the eighth assignment, which may also be taken in connection with the thirteenth assignment, which is that the court erred in submitting the case to the jury. There was no evidence legally sufficient to show that the plaintiffs in error ever assented to the alleged arrangement between Horton and the defendants in error that the latter should retain title to these two lots. The two papers (Rec., pp. 14 and 15), known

at the trial of this case as the extension papers, were nothing more than papers intending to extend the time within which Horton, the principal obligor, was to have to complete his contract. Neither of these papers refer to the fact that the terms and conditions of the contract itself had been altered and varied, and that no conveyance was to be made or had been made by the McKimmies to Horton of the two lots upon which the houses were to be built. The letter from Ambrose to the plaintiffs in error, and which is reproduced in the opinion of the Court of Appeals (Rec., p. 31), makes no reference to such a condition of affairs, but rests the claim of the plaintiffs in error solely upon the fact that they were bound by the terms and conditions of the bond sued on and the extensions of the time for the performance of the contract by Horton, the principal obligor, and makes no reference to any new arrangement between Horton and the plaintiffs in error other than for the extension of time. The only evidence on that subject at all is that, some time after Horton had entirely abandoned his work under the contract and had become hopelessly insolvent, at a meeting of his creditors, called by William E. Ambrose, and held at his office, "everybody seemed to think it was lucky that the two lots had not been conveyed." The plaintiffs in error say they never heard of such an arrangement or of said alleged language at the meeting at Ambrose's office, and knew nothing of it until their attention was called to it, when the original declaration was handed to the writers of this brief; and the original declaration did not contain such an allegation; and such allegation never was made, until after Chief Justice Clabaugh had determined that the variation of the terms of the contract was material and released the plaintiffs in error.

The lower court's action, as set forth in the twelfth assignment of error, in refusing to grant plaintiffs' in error fourth prayer, on the ground that the variation of the terms of the contract was immaterial, was also erroneous for the reasons above stated.

As to the tenth error assigned, being the refusal to grant the defendants' second prayer (Rec., p. 21), there was no evidence in the case that the plaintiffs had any title, good, or bad, to the property conveyed. They agreed to convey lots 27, 28, 29 and 30, in block 9, of Todd and Brown subdivision of Mount Pleasant and Pleasant Plains (Rec., p. 12), and they put in evidence (Rec., p. 20) a deed from themselves to George P. Horton, Jr., of lots 39 and 52, both inclusive, and 55 and 56 in Oscar A. M. McKimmie and others, subdivision of lot No. 9, of Todd and Brown subdivision of Mount Pleasant and Pleasant Plains. That is all the evidence on the subject, and there is nothing to show that the property mentioned in the deed is the same property mentioned in the agreement. Nor was there any evidence that anybody ever authorized the subdivision of the property agreed to be conveyed; and, therefore, it is submitted that it was also error to refuse the defendants' third prayer (Rec., p. 22), being the eleventh assignment of error.

The second and third assignment of error will now be considered. It is submitted that there was no evidence that either Kemp or Wilkinson ever signed these papers, both swore that they did not, and no man contradicted them. The papers purported to have been signed before one George E. Terry, a notary public. He was not produced as a witness nor was his absence accounted for. Even conceding that papers of this character do not require a witness, when a subscribing witness actually does attest a paper, the unvarying rule of evidence is that he

must be produced or his absence accounted for and his signature proved. The notarial seal does not import verity nor does the court take judicial notice of it, when affixed to instruments other than those to which it is customary, usual or necessary to affix it. 1 Greenleaf on Evidence, notes to sections 1 and 2, 29 Cyclopedia of Law and Procedure, 1094.

There is one other assignment of error for matters occurring prior to or during the trial, to wit: the fourteenth. The plaintiff, Oscar McKimmie, was asked (Rec., p. 17) by attorney for plaintiffs in error: "Did you subdivide the lots mentioned in the agreement between you and Horton without consulting Kemp and Wilkinson?" and, upon objection by defendants' in error attorney, the court refused to permit the question to be put. It is submitted that this is reversible error. There is not the least allusion, in the agreement or bond, to any subdivision of the property agreed to be conveyed by the defendants in error to Horton. There is an agreement on his part to reconvey two lots on Brightwood Avenue, with a house on each, 16 feet 8 inches front, free and discharged from any lien or incumbrances. But there is nothing in the agreement or the bond or the extension papers, or in any writing in the evidence in the case to show that the defendants in error were to subdivide "lots 27, 28, 29 and 30 in block 9, of Todd and Brown subdivision" or that anything was to be conveyed by them to Horton except those lots, and, it is submitted, that the question was pertinent and that the court should have allowed it to be put and answered. The court's action in overruling the motion for a new trial is not usually subject to review, but it seems to us that the present case is one in which there was absolutely no evidence to go to the jury, and it was error of law, reviewable in this court, to deny that motion. As to the

motion in arrest of judgment, it is submitted that no judgment could be entered in this case against the two plaintiffs in error without having the personal representative of the remaining joint and several obligor made a party to the Record. Merrick vs. Bank of Metropolis, 8 Gill., 64. In the case of White vs. Connecticut General Mutual Ins. Co., 34 App. D. C., 460, it was recently decided that it was proper to join the personal representative of one of several joint and several obligors in an action with the others. It would not have been error to have made such personal representative a party defendant on the Record in this case, and we submit, that it was error not to have made the personal representative a party, and, that, for this reason also, the judgment should have been arrested.

It would seem that the point attempted to be raised by this motion in arrest of judgment was not appreciated by the Court of Appeals at all for, in its opinion (Rec., p. 35), in considering this motion, it uses the following language:

> "That the action was discontinued as to Horton, who it seems had become insolvent, presents no ground for arresting the judgment. Section 1211 of the Code simply provides that one action may be sustained and judgment recovered against all or any joint and several obligors. It does not require that this shall be done."

The point sought to be urged was that Horton being dead it was necessary to make his personal representative a party to the record and not to discontinue the case against him and proceed alone against the surviving joint and several obligors, or, as the motion has it, against more than one and less than all.

It is therefore respectfully submitted that the judgment of the lower court should be reversed.

CHARLES POE,
ALFRED D. SMITH,
Attorneys for Plaintiffs in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 273.

OSCAR WILKINSON AND THOMAS J. KEMP, PLAINTIFFS IN ERROR,

vs.

OSCAR A. M. McKIMMIE AND SIMON McKIMMIE.

BRIEF FOR DEFENDANTS IN ERROR.

W. E. AMBROSE,
JOHN RIDOUT,
Attorneys for Defendants in Error.

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BRIEF FOR DEFENDANTS IN ERROR.

The attention of the court is called to the omission of an assignment of errors in the record, and it is submitted that this omission is not supplied by the belated assignment attempted in the brief. Because of this omission no question is adequately presented for review. Without waiving this contention the points made in the opposing brief will be considered. The objections sought to be raised are: That the form of the declaration was inappropriate and insufficient; that a ruling on a demurrer by one judge so dominates the case in its subsequent stages as that it is error for an appellate court to overrule it; that the evidence was insufficient to support the verdict; that the charge of the court erroneously

stated the law to the jury; that the omission to revive the case as against the personal representative of a deceased party to the contracts, which were joint and several, was error because of which judgment should have been arrested.

The Declaration.

The criticism of the declaration is of the utmost technicality. Reversals for such technical grounds have long been subject to condemnation by this court and in many instances have been denied. The declaration in this case is in covenant, and the instruments relied on, including the extension contracts, are all under seal.

Rule 27 of the trial court reads as follows:

> "The declaration shall state only the facts necessary to constitute the cause of action."

The court below sustained the declaration in so clear a statement as to render further comment than reference to its opinion unnecessary.

The ultimate test of a declaration under the present enlightened views of this court is: Does it fully acquaint the defendant with the case he is to meet? Surely the declaration herein does this. No demurrer to the amended declaration was filed.

The cases cited by plaintiffs in error all had to do with very different situations as to pleadings and proof, as will appear from the examination of them which this court will make.

But the declaration is sufficient in substance, even if subject to verbal criticism, as appears by frequent utterances of this court. The case of Dermott *vs.* Jones, cited by plaintiffs in error, is inapplicable. That was the converse of this proceeding, that being an action by Jones, the builder, to recover on an unperformed contract.

The true attitude of this court on the subject is shown in the views expressed in Standard Oil Company *vs.* Brown, 218 U. S., 78, and in the very recent case decided April 7, 1913, No. 176 of this term, of McCloskey *vs.* George A. Fuller Co. The motion in arrest may properly be dealt with here. Section 1209 of the District of Columbia Code provides as follows:

> "In actions *ex contractu* against alleged joint debtors it shall not be necessary for the plaintiff to prove their joint liability, as alleged, in order to maintain his action, but he shall be entitled to recover as in actions *ex delicto* against such of the defendants as shall be shown by the evidence to be jointly indebted to him or against one only if he alone is shown to be indebted to him, and judgment shall be rendered as if the others had not been joined in the suit."

And section 1211 as follows:

> "Where money is payable by two or more persons jointly or severally upon the same obligation or instrument one action may be sustained and judgment recovered against all or *any* of the parties by whom the money is payable at the option of the plaintiff, but if separate actions be brought unnecessarily against the several parties to such contract the said actions may on motion be consolidated and the plaintiff shall be allowed the costs of one action only."

These provisions would seem to have been framed expressly to meet the objection to the declaration and completely answer it. Besides, the declaration being complete on its face, the question cannot be raised by motion in arrest, and, finally, no exception was reserved to the ruling, thus waiving the objection.

Smith *vs.* Ross, 31 Appeals D. C., 352.

Taken as a whole, it is a declaration in covenant.

The citations of authorities in appellants' brief are all

based upon declarations clearly and unmistakably in assumpsit, of which Magruder *vs.* Belt, 7 Appeals, 303, is an illustration.

The fourth, fifth, seventh, eighth, and twelfth assignments of error are not well founded for the reasons that the effect of the ruling of Mr. Chief Justice Alvey on the demurrer had been completely met and overcome by the amended declaration.

Under the action of the jury it is really of no importance whether the variation in the terms of the contract was material or not, for the jury expressly found that with knowledge of such variation the defendants had signed what are known in the case as the "extensions," thereby ratifying and approving, with full knowledge, the action which had been taken.

The jury had before them both of the defendants, and those defendants had the benefit of eminent counsel's advice and knew how important it was to deny execution of the extension papers, and yet the court will observe how utterly they both failed to deny the execution of the papers, and their knowledge on the subject, not only of the extensions, but of the fact that the lots had not been conveyed, was corroborated by the testimony of Oscar A. M. McKimmie, Haller, and the letter of Mr. Ambrose, taken in connection with the silence of the defendants in the presence of the Ambrose letter.

Another most significant circumstance is that the defendants attended the meeting at Mr. Ambrose's office, which they would not have attended, accompanied as they were by Mr. Poe, had they not known that they were liable under the paper they had signed, together with the knowledge they had. And the jury from this circumstance alone would have been justified in finding as they did.

It further appears from the bill of exceptions (Rec., p. 26) that, at the suggestion of counsel for appellants, the

jury took to their room for comparison the bond, agreement, and the extension papers.

Upon examination of the contract between Horton and the McKimmies it will appear that the plaintiffs were not bound to show as a condition of recovery anything concerning the state of the title to the property referred to in the agreement, any question arising in respect to such title being a matter of defense if material at all.

It is respectfully submitted that it is not a rule of evidence that the only method of proving the execution of a document is by the testimony of the attesting witnesses. Such is the requirement only when the parties to the paper who are sought to be charged by it are not called as witnesses.

Ordinarily they are not so called, and then, of course, the presumably disinterested attesting witness can furnish the most reliable evidence of the execution.

But in this case the jury had the benefit of seeing and hearing the defendants testify and of observing that neither of them was willing to deny the execution of the papers, and the jury were no doubt greatly influenced, as they well might be, not only by the lack of denial of execution, but by the fact that Wilkinson practically admitted in terms the execution of the paper of July 27, 1906 (Rec., 19), and Kemp that of November 27, 1906 (Rec., 18).

It is difficult to see the materiality of the question of subdivision or not. It is apparent that the subdivision consisted merely of drawing lines at such distances apart as would produce lots of the appropriate size and frontage to correspond with the houses which were to be built, so that the question was wholly immaterial and the objection thereto was properly sustained.

The criticisms contained in the appellants' brief are, it is submitted, fully met and disposed of by the charge of the court, which is contained in the record and which shows that the case was submitted to the jury with absolute fairness to the defendants, and as appears by the record the jury found

every issue in favor of the plaintiffs, as especially appears by their answers to the questions submitted to them, a practice approved both by this court and the Supreme Court of the United States.

None of the assignments of error attempted to be based on insufficiency of evidence is maintainable here, because no exceptions on that ground were saved; on the contrary, learned counsel carefully stated what his grounds for the instructions were, and he himself saw to it that the disputed writings were taken to the jury-room and that inspection alone would have sustained the verdict. Nor did said counsel except to the charge of the court on any ground except that of the definition of rental value. It follows that no question of any importance arising upon the charge is here.

The cases cited, so far as in this court, will be found to be entirely inapplicable. This is notably true of Phillips *vs.* Construction Co., 91 U. S., 646. In that case an attempt was made to recover in covenant on a contract under seal and also, in the same declaration, to recover on a *quantum meruit* for extra work. The recovery on the covenant was sustained. In this case no such recovery is sought. This is not a suit by one who has performed his contract; *it is a suit for damages for non-performance* and, as so well stated in the opinion of the Court of Appeals, the defense foreshadowed in the demurrer to the original declaration is simply met in the amended declaration.

This vice appears in all the argument on the other side, which proceeds upon a theory applicable to a case where *the builder is suing;* not at all to a case where damages in covenant are sought for *a breach of a covenant under seal,* the "extensions" being simply relied on to negative release of the sureties by change of contract.

And the same is true of the State cases and Mr. Poe's book, which, even if apposite, could only be persuasive and could afford no ground to change the wise and just attitude which has been assumed by this court in its decisions in respect of such questions.

The opinion of the Court of Appeals, which is in the record, so fully meets and answers all the contentions of the plaintiffs in error that further discussion is deemed unnecessary. It is accordingly submitted that the judgment below was right and should be affirmed.

W. E. AMBROSE,
JOHN RIDOUT,
Attorneys for Defendants in Error.

[21102]

WILKINSON *v.* McKIMMIE.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 273. Argued May 1, 1913.—Decided June 9, 1913.

A court of equity looks to substance rather than to form. Whether the contract of the principal has been so altered as to discharge the surety is to be decided according to the essentials.

In this case *held* that an arrangement as to a reservation in a convey-

ance made simply to save expense of reconveyance and which did not alter the position of the principal or his surety was not such a material change as would discharge the surety.
36 App. D. C. 336, affirmed.

THE facts, which involve questions of liability of sureties on a bond and what constitutes a variation of contract sufficient to release them, are stated in the opinion.

Mr. Charles Poe and *Mr. Alfred D. Smith* for plaintiffs in error.

Mr. John Ridout, with whom *Mr. Wm. E. Ambrose* was on the brief, for defendants in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

By the judgment here under review the Court of Appeals affirmed a judgment in favor of the Messrs. McKimmie against Wilkinson and Kemp in an action upon a bond they had signed as sureties for one Horton. By an agreement in writing, the McKimmies agreed with Horton to convey to him four lots in Block 9 of Todd and Brown's subdivision of Mount Pleasant and Pleasant Plains for $11,500, which he agreed to take and pay for as follows: To assume a mortgage of $3,000 and pay $1,000 on delivery of the deed; to reconvey to the Messrs. McKimmie two lots, each 16 feet 8 inches front on Brightwood Avenue (part of the land above described), free and clear of encumbrances, and erect on each of these lots a two-story brick dwelling, according to approved plans and specifications, within eight months from the date of the agreement, for which construction and completion, clear of mechanics' liens or other encumbrances, Horton agreed to furnish a sufficient and satisfactory bond to the McKimmies; and for the balance of the purchase price, $500, Horton was

to give two notes, secured by a second deed of trust upon two other lots in the tract, "upon which he is to erect houses similar to those herein described." The agreement expressly provided that "The said houses contracted for to be constructed as aforesaid shall be delivered upon their completion to the parties of the first part [the Messrs. McKimmie] as their property in fee simple and shall be free and clear of all encumbrances or liens."

The bond in suit recited the agreement, and was conditioned for its faithful performance by Horton.

The opinion of the Court of Appeals (36 App. D. C. 336) sets forth the full history of the controversy and the course of the trial. We deem it necessary to mention only one of several matters that were discussed in argument before us, and that is, the contention that the plaintiffs in error were discharged from responsibility as sureties because of the fact that by arrangement made between the Messrs. McKimmie and Horton, instead of their conveying to him the two lots that were to be theirs in the outcome, and upon which he was to build the houses that were to become their property, they had, with his consent, reserved these two lots from the conveyance.

We agree with the Court of Appeals that while in form the contract required the plaintiffs to convey the whole of the land to Horton, who was to erect certain houses upon the two lots and reconvey them to the plaintiffs free and clear of encumbrances, the real purpose and effect of the agreement was that Horton was to have title to the remainder of the land in consideration of his erecting these two houses for the plaintiffs; and that, notwithstanding the form of the contract, its essence was such that if the McKimmies had conveyed the whole plot to Horton they would nevertheless have remained in equity the owners of the two lots. For a court of equity looks to substance rather than to form.

It is hardly necessary to say that the question whether

the contract of the principal has been altered so as to discharge the surety, is to be decided according to the essentials, in whatever jurisdiction it may be raised. And so we think the court correctly held that the arrangement that was made between the McKimmies and Horton, of reserving the two lots from the conveyance in order to save the expense of a reconveyance, was not a material change in the contract; that it did not alter the position of either Horton or his sureties, and therefore did not discharge the latter. *Read* v. *Bowman*, 2 Wall. 591, 603; *Reese* v. *United States*, 9 Wall. 13, 21; *Cross* v. *Allen*, 141 U. S. 528, 537.

Judgment affirmed.